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Trademark Unraveled: The U.S. Olympic Committee Versus Knitters of the World

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Trademark Unraveled: The U.S. Olympic Committee Versus Knitters of the World

Marcella David*

ABSTRACT

A cease-and-desist letter is a tool commonly used by corporations in their efforts to vindicate the rights they hold in protected words and symbols associated with their business and reputation. Some defend the use of cease-and-desist letters as an effective vehicle to quickly address legitimate claims of infringement. Others complain that the legitimate use of cease-and-desist letters is increasingly encroached upon by letters that grossly overstate legal claims in an effort to achieve results through intimidation. The proponents and detractors of the use of cease-and-desist letters likely would agree that the rights such letters seek to protect, the law interpreting those rights, and the use of the letters in protection of those rights are complicated by the exponential growth of e-commerce, and that the rise in do-it-yourself e-commerce only compounds the challenges.

This article examines the consequences of a notorious and controversial cease-and-desist letter from several perspectives. The letter is a helpful mechanism to understand a specialized grant of trademark rights associated with the Olympic Games, and how those rights might fail to protect the varying interests of the trademark holders, commercial actors, and the public; some modest suggestions explore alternative ways of conceptualizing and vindicating the rights at stake. The article concludes by assessing the letter and subsequent controversy for

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helpful lessons on lawyering, including the benefits of careful advocacy and creative business approaches, particularly in an e-commerce environment.

I. Introduction	707
A. Disclosures	712
II. Background	713
A. The USOC: The Olympic Spirit, American Style ...	713
B. Ravelry.com and the Ravelympics: A Knitting Community Picks Up the Torch	718
III. Can They Do That? Understanding the Legal Reach of the USOC	726
A. Understanding the ASA Framework	728
B. Distinguishing Lanham	733
C. The ASA Applied to Patterns and Postings	736
1. Patterns for Sale	737
2. Free Patterns and Postings	738
3. The Harder Case: Patterns for Sale with Olympic as a Descriptor	739
4. Assessing the USOC's Assertions of Law on Pattern Sales and Postings	742
D. The ASA Applied to Ravelympics	744
1. Assessing Whether the Ravelympics Simulation Tends to Cause Confusion	744
2. Assessing the Ravelympics Nexus with Trading	746
3. Assessing Ravelympics as an Exhibition, Performance, or Competition	749
4. First Amendment Considerations of the Objections to Ravelympics	750
IV. The Case for a Different Legal Framework	753
V. Lessons for Lawyering (or, What Were They Thinking, and Why Didn't Someone Stop Them!?)	759
A. Remember the Limitations of Law Students	759
B. The Cease-and-Desist Letter Was Wrong on the Law	760
C. The Cease-and-Desist Letter Was Poorly Written	760
D. Don't Forget to Think About Other Options: Creative Business Solutions	762
VI. Conclusion	763
Appendix I	764

I. INTRODUCTION

In June 2012 the United States Olympic Committee (USOC or Committee) issued one of the many cease-and-desist letters it sends every year.¹ The USOC is a federally chartered corporation, charged by Congress with administrative responsibility for U.S. participation in the Olympic Games, Paralympic Games, and Pan-American Games.² As part of its powers, it holds the statutory authority to protect certain symbols and words associated with the sporting events under its purview.³ This particular cease-and-desist letter, sent to an online social networking group for craft enthusiasts, was probably one of many sent that day and one of a flood likely to be sent in an Olympic Games year.

Cease-and-desist letters are a common tool for protecting intellectual property, whereby the owner of the intellectual property (here, the USOC) informs persons or entities (here, the online social network) that they are acting in a way that the owner believes is violating important rights (here, the improper use of the word “Olympic,” an inappropriate simulation of the word “Olympic,” and the unauthorized use of the trademarked Olympic rings).⁴ The letters typically warn the purported violators that if they do not “cease and desist,” the owner will seek vindication of those intellectual property rights in court.⁵

This common business practice often leads the target of the letter to cease and desist.⁶ They may be happy to comply, once

1. See Juliet Macur, *U.S.O.C. Knits a Controversy*, N.Y. TIMES (June 21, 2012, 9:25 PM), <http://london2012.blogs.nytimes.com/2012/06/21/u-s-o-c-knits-a-controversy>.

2. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220502–03 (2006).

3. U.S. Olympic Comm. v. Olympic Supply, Inc., 655 F. Supp. 2d 599, 601 (D. Md. 2009).

4. See Deborah A. Wilcox, *Resist Cease and Desist: A Lighter Approach May Work Better With Trademarks*, 15 BUS. L. TODAY 27, 27 (2006) (“A typical cease and desist letter will outline, in strong terms, the trademark owned by the rights holder; explain why the recipient is infringing on that right; and set forth legal claims for trademark infringement . . . under federal and state laws.”).

5. Cf. *id.* (“The letter often will conclude by requiring that the recipient send detailed information on its use of the mark and written assurances that the infringement will cease, under threat of further legal action.”).

6. William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49, 64 n.72 (2008) (“One unscientific study of cease-and-desist letters involving both copyright and trademark claims found significant degrees of

they are made aware of the prior-existing trademark and that their actions can be viewed as violating trademark law. They may be afraid of being sued, or concerned about the costs of litigation.⁷ They might not appreciate that litigation offers the opportunity to test the validity of the trademark, the trademark owner's assertion that the complained of use violates trademark law, or other defenses appropriate in trademark cases.⁸ Faced with a threatening letter spiced with legalese, most fold, quickly and quietly, generating at most a modest notice in the pages of a legal journal.⁹

The USOC appears to be remarkably successful in its use of cease-and-desist letters in protection of its interests.¹⁰ That success is notwithstanding unique challenges faced by the

compliance even where the intellectual property claims were weak or potential defenses were strong . . .").

7. See Regina Schaffer-Goldman, Note, *Cease-and-Desist: Tarnishment's Blunt Sword in Its Battle Against the Unseemly, the Unwholesome, and the Unsavory*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1241, 1291 (2012) ("[I]t is likely that the cost of litigation will be daunting for the recipient of a cease-and-desist letter, and this will lead him or her to 'settle the case and self-censor . . . speech rather than fight in court for the right to use particular language.'" (citations omitted)).

8. See generally *Frequently Asked Questions (And Answers) About Trademark: What to Expect when You're Expecting to Be Sued for Trademark Infringement*, CHILLING EFFECTS, <http://chillingeffects.org/trademark/faq.cgi#QID486> (last visited Mar. 1, 2013) (providing basic information on trademark law for those anticipating defending against an infringement claim).

9. See *supra* note 6 and accompanying text. "Chilling Effects," a "joint project of the Electronic Frontier Foundation and Harvard, Stanford, Berkeley, University of San Francisco, University of Maine, George Washington School of Law, and Santa Clara University School of Law clinics" posits that "[a]necdotal evidence suggests that some individuals and corporations are using intellectual property and other laws to silence other online users." CHILLING EFFECTS, <http://chillingeffects.org> (last visited Feb. 21, 2013).

10. There are remarkably few reported cases involving the USOC's trademarks and protected words. Important examples are: *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); *O-M Bread, Inc. v. U.S. Olympic Comm.*, 65 F.3d 933 (Fed. Cir. 1995); *U.S. Olympic Comm. v. Intelicense Corp.*, 737 F.2d 263 (2d Cir. 1984); Memorandum, *U.S. Olympic Comm. v. Tobyhanna Camp Corp.*, No. 3:10-CV-162 (M.D. Pa. Qug. 4, 2010); *U.S. Olympic Comm. v. Olympic Supply, Inc.*, 655 F. Supp. 2d 599 (D. Md. 2009); *U.S. Olympic Comm. v. Xclusive Leisure & Hospitality Ltd.*, 89 U.S.P.Q.2d 2011 (N.D. Cal. 2008); *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200 (D. Colo. 2001); *U.S. Olympic Comm. v. Union Sport Apparel*, 220 U.S.P.Q. 526 (E.D. Va. 1983); *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112 (S.D.N.Y. 1980).

USOC. One such challenge is public perception: the USOC has to deal with the unfortunate fact that the Olympics is an event with global reach, advertised as belonging to the people, and thus the associated marks and symbols are subject to uncommonly high feelings of popular ownership. The Supreme Court may have held that the protected words no longer have an unqualified “generic” status and that the USOC deserves to control their use in certain circumstances,¹¹ but that view has yet to trickle down into the U.S. populace.¹² “Olympian” may be understood by the USOC as someone who participated in the Olympic Games, but “olympian” is also used—correctly or not—to denote superior effort, and can be found in literary works, contemporary novels, and other cultural mediums.¹³

Adding to the confusion, the word “Olympic” had wide usage in business as a geographic location and as a cultural reference before the creation of the USOC *or* its trademark rights¹⁴: the Olympic Mountains of Washington State, which are found on the Olympic Peninsula and are named for the Greek mountain Olympus (Olympus was home to the original “Olympians,” the Greek gods of mythology), are merely the largest and most famous examples of prior use.¹⁵ The owners of every Greek diner in New York and the innumerable “Olympic” gas stations, restaurants and tourist stores located in Washington State likely view their use of “Olympic” as an appropriate cultural reference or geographical description, or both.¹⁶

11. *S.F. Arts & Athletics*, 483 U.S. at 531–33.

12. See Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131, 172–84 (1989) (discussing the tension between the USOC’s power to control even non-commercial uses of “Olympic” and the First Amendment). As anecdotal evidence, several children known to the author reported participating in summer camp “Olympic” competitions.

13. General use of the word “olympian” is reflected in *Olympian*, FREE DICTIONARY, <http://www.thefreedictionary.com/Olympian> (last visited Mar. 1, 2013) (defining an Olympian as “[o]ne who is superior to all others”).

14. See, e.g., *History of the Olympian*, THEOLYMPIAN.COM, <http://www.theolympian.com/history/> (last visited Mar. 1, 2013) (describing the history of a newspaper in Olympia, Washington which started using the name “The Daily Olympian” in 1889).

15. See, e.g., NATIONAL PARK SERVICE, U.S. DEP’T OF THE INTERIOR, OLYMPIC: EUROPEAN AND EURO-AMERICAN HISTORY 1–2 (2004), available at <http://www.nps.gov/olym/historyculture/upload/Euro-history.pdf> (describing the history and discovery of the Olympic Peninsula).

16. Cf. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(d) (2006) (allowing businesses near to the Olympic Peninsula using “Olympic” before September 21, 1950 to have grandfathered use of the word).

Not so, says the USOC, which claims that any unauthorized use can demean the Olympic brand or detract from the marketability of the Olympic Games sponsorship to big corporations such as McDonalds, Nike, or Visa.¹⁷ And the USOC doesn't back down. It famously challenged the Gay Olympics effort (now known as the Gay Games), notwithstanding the organizers' arguably noble goal of further broadening the community of competitive sports.¹⁸ The Committee is equally adamant in vindicating trademark rights even where there is no likelihood of confusion. For example, it recently targeted a Greek gyro restaurant in Pennsylvania, which had operated under the name "Olympic Gyro" for nearly thirty years.¹⁹ It has also argued against the use of the Olympic words and trademarks in political speech, including a grassroots effort to challenge the planned post-games use of Olympic facilities after the Lake Placid Games.²⁰ In vigorous

17. For example, in *U.S. Olympic Committee v. American Media, Inc.*, the USOC accused the defendant, American Media, Inc. (AMI), of interfering and "impair[ing]" the USOC's ability to "generate the funds it needs to fulfill 'its Congressionally-mandated [sic] responsibility of funding the United States' participation in the Olympic Games." *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1204 (D. Colo. 2001). The USOC blamed AMI's publication of a magazine called Olympics USA (which used the Olympic symbol, the actual term "Olympic," photos of the event, articles, and paid advertisements) for a loss of revenue. *Id.* at 1203–04. For more information on official sponsors of the Olympic Games, see *Sponsors*, TEAM USA, <http://www.teamusa.org/Sponsors.aspx> (last visited Mar. 1, 2013).

18. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); Kravitz, *supra* note 12, at 160 ("The purposes of the contest were to draw attention to the gay cause and to counteract negative and stereotypical biases toward gays . . ."). For the curious, a few organizations have been granted permission to use the word "Olympic" in connection with events "for handicapped persons ('Special Olympics') and for youth ('Junior Olympics' and 'Explorer Olympics')." *S.F. Arts & Athletics, Inc.* 483 U.S. at 542 n.22. However, an effort to create an "Olympic" event by the March of Dimes was rebuffed. *Id.* at 542 n.22, 571 n.34.

19. Timothy Geigner, *US Olympic Committee Forces 30 Year Old Philadelphia Gyro Restaurant to Change Its Name*, TECHDIRT (July 19, 2012, 5:10 AM), <http://www.techdirt.com/articles/20120713/06513919689/us-olympic-committee-forces-30-year-old-philadelphia-gyro-restaraunt-to-change-its-name.shtml>; Anna Pan, *Reading Terminal Shop Gets Olympic-Sized Reprimand*, PHILLY.COM (July 12, 2012), http://articles.philly.com/2012-07-12/news/32633390_1_usoc-lunch-counter-olympic-sports.

20. *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112, 1114–16 (S.D.N.Y. 1980).

defense of its brand and income,²¹ the USOC seems to have never backed away from a fight.

But when the USOC challenged activities on Ravelry.com, one of the world's largest online craft communities, through a strongly worded cease-and-desist letter, the Committee was forced into retreat. Within days of sending the letter, the USOC had won the bout (the purported offending behavior was ceased), but the knitters scored a number of takedowns, leading to two apologies (of sorts) from the USOC.²² The conflict generated worldwide press, much of it bad, and all of it distracting from the opening of the London Games.²³ This article examines questions of law highlighted by the USOC dispute; it offers a few solutions to the problems arising from the broad authority granted the USOC on the one hand, and the challenges of protecting both trademark and expressive rights in the unfettered environment of internet marketing, on the other hand. After briefly providing background about the

21. The intensity of the USOC in this effort is replicated by the International Olympic Committee and other national committees and local organizers of games. *See, e.g.,* Int'l Olympic Comm. v. S. F. Arts & Athletics, 219 U.S.P.Q. 982 (N.D. Cal. 1982) (providing an example of the International Olympic Committee as a plaintiff challenging unauthorized use of Olympic marks); LONDON ORGANISING COMM. OF THE OLYMPIC GAMES & PARALYMPIC GAMES, BRAND PROTECTION (2010), *available at* <http://www.london2012.com/documents/brand-guidelines/statutory-marketing-rights.pdf> (describing statutory protections to marks associated with the Olympic Games and London 2012); *see generally* Kellie L. Pendras, *Revisiting San Francisco Arts & Athletics v. United States Olympic Committee: Why it Is Time to Narrow Protection of the Word "Olympic,"* 24 U. HAW. L. REV. 729 (2002) (discussing international protection of the Olympic marks under the purview of the International Olympic Committee).

22. *See, e.g.,* Macur, *supra* note 1 ("The response by the knitters—flooding the U.S.O.C.'s e-mail, putting thousands of posts on Twitter and commenting on its Facebook page hundreds of times over—forced the organization to apologize not once, but twice in a span of 24 hours.").

23. News articles were published in *The New York Times* and *Businessweek*, and the controversy was covered on National Public Radio and by a variety of national news blog sites. *See, e.g.,* Macur, *supra* note 1; Mark Memmott, *After Knitters Get in a Twist, USOC Apologizes for 'Cease and Desist' Letter*, NPR (June 21, 2012, 1:55 PM), <http://www.npr.org/blogs/thetwo-way/2012/06/21/155508908/after-knitters-get-in-a-twist-usoc-apologizes-for-cess-and-desist-letter>; Will Oremus, *Mob of Angry Knitters Takes the Gold in Battle with U.S. Olympic Committee*, SLATE (June 22, 2012, 3:52 PM), http://www.slate.com/blogs/future_tense/2012/06/22/ravelry_olympics_usoc_apologizes_to_online_knitting_community_over_trademark_crackdown.html; Claire Suddath, *Why the U.S. Olympic Committee Cracked Down on a Knitting Group*, BLOOMBERG BUSINESSWEEK (June 22, 2012), <http://www.businessweek.com/articles/2012-06-22/why-the-u-dot-s-dot-olympic-committee-cracked-down-on-a-knitting-group>.

USOC, Ravelry.com, and the proposed “Ravelympics,” this article is organized around the larger questions (and the inevitable sub-parts) that should *always* be considered when evaluating the solution to a client’s legal problem: Can my client do that? And should they do that? This article thus explores both the scope of the USOC’s rights under the Amateur Sports Act (ASA) and the non-legal consequences of pursuing a potentially “lawful but awful” course of action.²⁴ It concludes first that the USOC overstated the strength and scope of important elements of its claimed rights. It also concludes that the strategy pursued by the USOC was unnecessarily confrontational and counter-productive, ultimately to the detriment of the Committee’s interests. Finally, the article advocates for the adoption of creative business strategies that might better protect the interests of the USOC in the fluid and hard-to-navigate world of internet commerce and social networking.

A. DISCLOSURES

First, in the interest of full disclosure, I must admit that I am a “knitting professor,”²⁵ one of several colleagues who knit our way through faculty meetings and retreats.²⁶ I am a member of The Knitting Guild Association,²⁷ and attend knitting conferences, workshops, and conventions hosted by that organization as well as others. I am also a member of the Ravelry.com online community, albeit an indifferent member—

24. In an address given January 6, 2013, to the American Association of Law Schools, Harold Koh, outgoing Legal Advisor to the U.S. Department of State, described the combination of “necessary” questions as “what are my client’s legally available options?” and its follow-up question, “[A]re those legally available options *advisable*?” or are they “lawful, but awful.” Cf. Harold H. Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>) (describing the need for a legal adviser to serve as a source of both black letter law and good judgment and to advise clients when a proposal is “lawful but awful”).

25. This term embraces both action (a professor who knits, here a law professor) and vocation (a person who teaches knitting classes).

26. My thanks to my colleague Carolyn Jones, Dean Emerita and F. Wendell Miller Professor of Law, and fellow knitter, for bringing this controversy to my attention.

27. See KNITTING GUILD ASS’N, <http://www.tkga.com> (last visited Feb. 26, 2013).

a “lurker”—with no postings, few messages, and very limited use.²⁸ Unlike a trademark expert who might also write about this issue, I approach it from a perspective primarily informed by my observations of the reactions of the press and the crafting community to the dispute, as well as by my position as a legal academic, concerned about what and how we teach future professionals about the elements of good lawyering. Finally, I come to this with no bias in favor of knitters, or against trademarks generally or the USOC specifically. I was an engineering major, and flirted with the idea of practicing in patent, copyright, and trademark law, and some of my best . . . acquaintances . . . are intellectual property lawyers.²⁹

II. BACKGROUND

A. THE USOC: THE OLYMPIC SPIRIT, AMERICAN STYLE

The U.S. Olympics effort has existed since the birth of the modern Olympics in 1896.³⁰ The USOC and its predecessor organizations have guided U.S. participation nearly all that time. In 1950 Congress federally chartered the USOC,³¹ and in 1978 Congress enacted the ASA,³² which established operating principles and goals and, importantly, provided the USOC with

28. In internet parlance, a lurker is a person who follows the forum, but with very limited or no postings. See *Lurker*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=lurker> (last visited Feb. 26, 2013).

29. This is, of course, a variant of “The Friend Argument,” by which a person seeks to demonstrate familiarity and solidarity with a group by referring to a friendship with someone from that group. See *Friend Argument*, RATIONAL WIKI, http://rationalwiki.org/wiki/friend_argument (last visited Feb. 26, 2013); see generally TANNER COLBY, *SOME OF MY BEST FRIENDS ARE BLACK: THE STRANGE STORY OF INTEGRATION IN AMERICA* (2012). Ironically, USOC Spokesman Patrick Sandusky reportedly relied on “The Friend Argument” while responding to the controversy, telling *The New York Times* that his wife and mother-in-law are knitters. See Macur, *supra* note 1.

30. Much of the history is culled from case summaries and informational material provided by the USOC. See generally *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987); *History*, TEAM USA, <http://www.teamusa.org/About-the-USOC/Inside-the-USOC/History> (last visited Mar. 19, 2013) (USOC description of organization’s history).

31. The Committee was then known as the U.S. Olympic Association. See 15 U.S.C. § 383 (1964).

32. Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045 (amended as the Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501–529 (2006)). Unless indicated, the provisions discussed *infra* were not affected by the revision. This article will refer to both as the Amateur Sports Act or ASA.

property rights in certain marks and words associated with the Olympics and broad powers to enforce those rights.³³

The conferral of Congressional authority was steeped in the Cold War context:

The fundamental purpose of that Act was to safeguard the USOC's ability to raise the financial resources that are a critical component of America's capacity to send world-class amateur athletes into international competition without the massive government subsidies enjoyed by competitors from other nations.³⁴

At the time, the United States was the only nation that did not support its athletes with public funds.³⁵ National frustration grew about the incredible accomplishments of state-supported athletes such as famed Soviet gymnast Olga Korbut, who was identified by and nurtured in state-sponsored gymnastics programs from the age of eight.³⁶ She went on to earn four gold and two silver medals in the 1972 and 1976 games.³⁷ She was merely one member of a juggernaut Soviet effort: in 1976 the Soviet Union earned 125 medals, while the United States earned 94.³⁸ Two years later, the ASA was passed.³⁹

33. Noëlle K. Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998, the United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 SETON HALL J. SPORT L. 53, 57 (2003) (explaining that before the enactment of the ASA in 1978, the marks and words were protected by criminal sanctions).

34. U.S. Olympic Comm. v. Intelicense Corp., 737 F.2d 263, 264 (2d Cir. 1984).

35. See *id.* at 266 ("Because the USOC is the only [National Olympic Committee] that does not receive formal financial assistance from the Government, financing the United States Olympic team poses unique obstacles.").

36. See *id.*

37. See Alex Voinich, *Olga Korbut Achievements*, OLGA KOR BUT, <http://olgakorbut.org/honors> (last visited Mar. 2, 2013).

38. Lee Byron et al., *A Map of Olympic Medals*, N.Y. TIMES (Aug. 4, 2008), http://www.nytimes.com/interactive/2008/08/04/sports/olympics/20080804_ME_DALCOUNT_MAP.html.

39. Other considerations were the perceived disorganization and ineffectiveness of the USOC and the U.S. Olympic effort. See JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 287–91 (Trans. Press 2d ed. 2004) (detailing the history of adoption). Two years after the passage of the ASA, the United States had one of its best Winter Olympic efforts, as host of the 1980 Olympic Games in Lake Placid, New York. The gold medal count doubled, and the overall number of medals increased from ten to twelve. *A Map of Winter Olympic Medals*, N.Y. TIMES, <http://2010games.nytimes.com/medals/map.html> (last visited Mar. 4, 2013). Traditionally, the national teams of host states have an improved showing, and in later Winter Games the U.S. effort dipped to previous levels and below. See *id.*

In order to generate sufficient income to increase the competitiveness of the U.S. Olympic team, the ASA anticipated that the USOC would “authorize contributors and suppliers of goods or services” to use the marks and words of the USOC and the Olympics.⁴⁰ In order to protect that income stream, Congress also conferred enhanced authority upon the USOC, granting it rights that, in certain circumstances, exceeded those then enjoyed by most trademark owners, and enhanced enforcement powers.⁴¹ Relying on those rights, the USOC has been vigorous in its exploitation of licensing and sponsor income, generating revenues of \$141 million in 2011; it will likely generate revenues in excess of \$250 million in connection with the 2012 London Games.⁴² In non-Games years, the USOC expenses typically exceed revenues by a significant amount.⁴³

It must be noted that the model of Olympic competition is now quite different from that understood by Congress in 1978. In 1986, just a few years after the ASA was enacted, the USOC amended its rules to permit professional athletes to compete,⁴⁴ creating a challenging mix of amateur, professional, and high-income amateur athletes brought together to compete for the United States. Under the new eligibility rules, today it is common to see players in the National Basketball Association, Women’s National Basketball Association, U.S. Tennis Association, and even the Association of Volleyball Professionals recruited to represent the United States. Scattered amongst professional athlete Olympians, such as

40. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(b) (2006).

41. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 523 (1987) (noting that the enhanced protections are not greater than necessary to protect a legitimate interest and thus does not infringe upon First Amendment rights); *see also Intelicence Corp.*, 737 F.2d at 265–66.

42. USOC 990 tax forms are available on its website. *Financial*, TEAM USA, <http://www.teamusa.org/Finance.aspx> (last visited Mar. 19, 2013) (“Total revenue was \$141 million in 2011, down from \$251 million in 2010. This was expected as broadcasting revenue is recorded only in a Games year.”).

43. *See id.* (noting expenses of \$185 million in 2011; tax forms for prior non-Games years show a similar revenue gap).

44. *See* ALEXANDRE MIGUEL MESTRE, *THE LAW OF THE OLYMPIC GAMES* 72–74 (TMC Asser Press 2009) (discussing the history of amateurism in the Olympic movement); NAFZIGER, *supra* note 39, at 137–46, 293–96 (discussing the changing understanding of amateurism and the challenges of enforcing a strict definition, and discussing the way amateurism is handled by the USOC); *Olympic Changes: Dollars and Sense*, PBS (July 23, 1996), http://www.pbs.org/newshour/forum/july96/olympics_7-23.html (discussing the timing of the USOC treatment of amateurism).

Kevin Love (power forward for the Minnesota Timberwolves)⁴⁵ and Serena Williams (Wimbledon winner 2002, 2003, 2009, 2010, and 2012),⁴⁶ are amateurs like Michael Phelps, one of several Olympians who is a paid spokesperson for Subway Restaurants, for which they earn significant non-sporting income.⁴⁷ Indeed, newly minted gold-medal gymnast Gabby Douglas appeared on an advertisement for Kellogg's brand cereal Cornflakes just hours after winning the all-around competition.⁴⁸ And no wonder many amateur Olympians are taking these advertisement opportunities—for most of them the costs of training are still mostly borne by their families; the effort to fund amateur gymnast Gabby Douglas's training reportedly led her mother to file for bankruptcy.⁴⁹

Beyond the complicated question of generating funds to support the U.S. Olympic effort, the USOC has other statutory responsibilities, including the management of and financial responsibility for the Paralympic Games and Pan-American Games, promoting physical fitness and public participation in amateur athletics, and encouraging health and the advancement of sports medicine and sports safety.⁵⁰ The USOC is also responsible for promoting participation in amateur athletics by women, minorities, and handicapped individuals.⁵¹ However, the responsibility of generating sufficient funding and otherwise supporting the training and development of

45. *USA Basketball Men's National Team Rosters*, USA BASKETBALL, <http://www.usabasketball.com/mens/national/roster.html> (last visited Mar. 4, 2013).

46. *Serena Williams*, LONDON 2012, <http://www.london2012.com/athlete/williams-serena-1131104> (last visited Mar. 4, 2013).

47. See Alicia Jessop, *Subway's Partnership with Michael Phelps Brings the Brand Large-Scale Exposure*, FORBES (July 17, 2012, 1:11 PM), <http://www.forbes.com/sites/aliciajessop/2012/07/17/subways-partnership-with-michael-phelps-brings-the-brand-large-scale-exposure>.

48. Stephen Smith, *Gabby Douglas the New Cover Girl for Corn Flakes*, CBS NEWS (Aug. 3, 2012, 3:38 PM), http://www.cbsnews.com/8301-31751_162-57486410-10391697/gabby-douglas-the-new-cover-girl-for-corn-flakes ("Kellogg's was quick to pounce, putting the golden girl on Corn Flakes boxes just hours after the gymnast claimed the all-around title Thursday.").

49. See *Gymnast Gabby Douglas' Mom Filed for Bankruptcy*, CBS NEWS (Aug. 6, 2012, 8:45 AM), http://www.cbsnews.com/8301-505245_162-57487172/gymnast-gabby-douglas-mom-filed-for-bankruptcy.

50. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220503 (2006).

51. *Id.* at § 220503(12)–(14).

athletes is perhaps the most significant of the USOC's statutory obligations.

As if the complicated mix of statutory responsibilities wasn't enough, the USOC also plays an important political role as a global representative of U.S. interests and values. The USOC is a *de facto* ambassador of the United States, albeit with diplomatic responsibilities that are hard to describe and complicated by the inconsistent actions by a team of hundreds of athletes and employees.⁵² These international relations responsibilities are not expressed in its federal charter, and it must be emphasized that the U.S. government has no monetary investment in the USOC and exerts no corporate control over its operations. However, in 1980 there existed little doubt in the executive and legislative branches that President Jimmy Carter could prevent the U.S. team from participating in the Moscow Olympics to protest the Soviet invasion of Afghanistan; if not through a direct order, then by other methods at his disposal, including use of presidential national emergency powers.⁵³ There is, in the view of many, a demonstrated "impact and interrelationship of USOC decisions on the definition and pursuit of the national interest."⁵⁴

The successful pursuit of all these responsibilities—sponsor of the premier international sporting event, promoter of sports and health in the United States, and unofficial ambassador of U.S. interests abroad—is enhanced by the strong reputation and positive corporate goodwill of the USOC. Of course, the corporate goodwill of the USOC directly affects its ability to generate income as well. Accordingly, in upholding these responsibilities and enforcing its duties to the athletes and public, the USOC has expended a great deal of time and

52. *Cf. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 550 (1987) (Brennan, J., dissenting) ("The USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community. . . . As the Olympic Games have grown in international visibility and importance, the USOC's role as our national representative has taken on increasing significance.").

53. *See S.F. Arts & Athletics, Inc.*, 483 U.S. at 545–46 n.27 ("Although the President and Congress indicated their view that the United States athletes should not go to the Moscow Olympics, this was not the end of the matter. The President thought it would be necessary to take 'legal actions . . . ' to prevent the USOC from sending a team to Moscow. Previously, the Attorney General had indicated that the President believed that he had the power under the Emergency Powers Act to bar travel to an area that he considered to pose a threat of national emergency." (citations omitted)).

54. *Id.* at 553 (Brennan, J., dissenting).

effort into protecting the reputation of the U.S. Olympic effort and the marks and symbols that represent it. In *International Federation of Bodybuilders*, the court noted:

The Olympic Committee is able to successfully raise funds from the private sector because of the tremendous goodwill it has built up over the years through its various activities and programs. It is this goodwill which makes it desirable for contributors to associate themselves with the Olympic Committee and various Olympic activities.

The goodwill and reputation of the Olympic Committee are its greatest and most valuable assets.⁵⁵

The Ravelry.com controversy provides an opportunity to explore the methods and vigor with which the USOC protects its interests, including the integrity of its marks and words, and their potential to generate income.

B. RAVELRY.COM AND THE RAVELYPICS: A KNITTING COMMUNITY PICKS UP THE TORCH

Ravelry.com⁵⁶ is an online community described as a “place for knitters, crocheters, designers, spinners, weavers and dyers to keep track of their yarn, tools, project and pattern information, and look to others for ideas and inspiration.”⁵⁷ Launched by an avid fiber artist blogger and her husband in 2007,⁵⁸ as of March 2013, it boasted a community of over three million members from around the world.⁵⁹ Like all social

55. U.S. Olympic Comm. v. Int’l Fed’n of Bodybuilders, 219 U.S.P.Q. 353, 356 (D.D.C. 1982).

56. Because my particular avocation is knitting, I will conform with the press description of Ravelry.com as a “knitters group” without any disrespect to my fellow crafters.

57. *About Us*, RAVELRY, <http://www.ravelry.com/about> (last visited Feb. 26, 2013).

58. Jess Forbes and Casey Forbes describe the creation of Ravelry.com on the site’s “About Us” page:

Jess had been a knitter and a blogger for a while, and, because she was an active blogger, she knew that there was all this great information out there from other fiber lovers – but with the growing number of crochet and knitting blogs, finding that information just kept getting harder! It was getting frustrating for her to try and find information about the patterns and yarns that she was interested in using. Casey thought that he would be able to build a website that could solve her problems, so they started working on it together, introducing it to a few friends at a time.

Id.

59. RAVELRY, <https://www.ravelry.com> (last visited Mar. 4, 2013) (membership required for access).

networking sites, Ravelry.com is primarily user-driven. Like Facebook and Google+, Ravelry.com is also a commercial venture; its income is derived from advertising, the sale of logoed merchandise, a fee from the sale of patterns posted by designers, special event programming, donations, and commissions from other businesses, such as Amazon.com.⁶⁰ Ravelry.com users do not pay a membership fee.⁶¹

The specialized social networking platform allows users to blog and share information, and organize their hobbies. Amongst the networking and organizing activities available to members are the ability to post, market, sell, and download patterns; catalog and trade yarn (“stash”); track a personal library of knitting patterns; log projects and post questions; brag about projects and post photos; post reviews and critiques of books; post pattern corrections; and organize projects.⁶² This list is nonexclusive, and the site is further enhanced by mobile device capabilities and companion applications (marketed independently) that run on iPads, iPhones, and Android devices.⁶³ Most importantly, Ravelry.com allows members to organize into smaller groups, schedule group events, and send messages to and follow group members. Similar to Facebook and Google+, users range in levels of sophistication, interest, and purpose, from new knitters to knit-shop owners and well-respected designers.⁶⁴

The USOC cease-and-desist letter of June 2012 cited two behaviors occurring on the Ravelry.com site, which, in its view, infringed upon USOC rights in certain trademarks and words: “Ravelympics” and the distribution of unauthorized items bearing protected words and marks.⁶⁵

Ravelympics was a user-organized event. The 2012 effort was modeled on prior group projects coinciding with the 2008

60. Casey, *How Does Ravelry Make Money?*, RAVELRY BLOG (Jan. 25, 2012), <http://blog.ravelry.com/2012/01/25/how-does-ravelry-make-money>.

61. *See id.* (noting that Ravelry is a free website).

62. *See* RAVELRY, *supra* note 59 (membership required for access).

63. *Ravelry Mobile Site*, RAVELRY, <http://www.ravelry.com/about/apps> (last visited Mar. 4, 2013).

64. *See Groups*, RAVELRY, <http://www.ravelry.com/groups> (last visited Mar. 4, 2013) (membership required for access).

65. *Notice from United States Olympic Committee*, RAVELRY, <http://www.ravelry.com/discuss/for-the-love-of-ravelry/2189293/1-25> (last visited Feb. 24, 2013) [hereinafter *USOC Notice*] (membership required for access); *see also* Suddath, *supra* note 23 (describing the letter).

and 2010 Olympic Games.⁶⁶ The organizers of the 2012 Ravelympics invited community members to form teams and to register those teams as part of the 2012 Ravelympics user group.⁶⁷ Participants would complete projects for points and earn rewards in the form of “blog badges.”⁶⁸ Projects were arranged around thirty-two events, such as “afghan marathon” (knit or crochet an afghan), “baby dressage” (knit or crochet items used by infants), “charity rowing” (knit or crochet items to be given away to charities), “lace long jump” (knit or crochet projects in laceweight or fine yarn with lace), and “sweater triathlon” (knit or crochet a sweater, coat, or dress).⁶⁹ There was no overt profit motive associated with Ravelympics;⁷⁰ unlike some group events, it was not organized to encourage participants to work on a single project or pattern, or to promote designs or materials sold by the organizers.⁷¹

Importantly, Ravelympics promoted the Olympic Games. Pursuant to “The One Rule to Rule Them All,”⁷² the participants were only awarded points for projects worked on during the Olympic Games.⁷³ A virtual clock allowed teams to participate in a synchronized “mass cast-on” to start the Ravelympics, timed to the Opening Ceremonies, as well as an official ending timed to the Closing Ceremonies.⁷⁴ Significantly,

66. See *2008 Ravelympics*, RAVELRY, <http://www.ravelry.com/groups/ravelympics-2008> (last visited Mar. 6, 2013) (membership required for access); *2010 Ravelympics*, RAVELRY, <http://www.ravelry.com/groups/ravelympics-2010> (last visited Mar. 6, 2013) (membership required for access); *USOC Notice*, *supra* note 65.

67. Kimberli, Posting to *Updates and Breaking News*, RAVELRY (Apr. 19, 2012), <http://www.ravelry.com/discuss/ravellenic-games-2012/2092771/1-25> (membership required for access).

68. *Basic Rules*, RAVELRY, <http://www.ravelry.com/groups/ravellenic-games-2012/pages/The-Basic-RULES> (last visited Mar. 6, 2013) (membership required for access).

69. *Events 2012*, RAVELRY, <http://www.ravelry.com/groups/ravellenic-games-2012/pages/EVENTS-2012> (last visited Mar. 6, 2013) (membership required for access).

70. *Ravenellic Games 2012*, RAVELRY, <http://www.ravelry.com/groups/ravellenic-games-2012> (last visited Mar. 6, 2013) (membership required for access).

71. See *infra* note 75.

72. A homage to the Lord of the Rings trilogy, J.R.R. TOLKIEN, *THE FELLOWSHIP OF THE RING* 55 (3d ed. 1966) (“One Ring to rule them all, one ring to find them, one ring to bring them all, and in the darkness bind them.”).

73. *Basic Rules*, *supra* note 68.

74. *Ravenellic Games 2012*, *supra* note 70.

much of the Ravelympics effort was organized around *watching* the Olympic Games.⁷⁵ Eager participants, among the more than 10,000 official group members,⁷⁶ planned knitting parties to watch their favorite Olympic events together (in person or virtually).⁷⁷ Similarly, message boards shared links to streaming coverage.⁷⁸ Translated to a non-knitting context, Ravelympics was akin to someone with a really, really big Facebook following who challenged friends to count how many beers they could drink while watching the Olympic basketball tournament, and calling it “Lagerlympics.”⁷⁹

Ravelympics, like the Facebook drinking hypothetical, was user-driven, and did not directly tie to commercial activity by the event organizers. However, the site organizers, in contrast to the event organizers, had both indirect and direct financial interests in the activity associated with Ravelympics. Pursuant to its business model, Ravelry.com benefited from any incremental increase in traffic that led to increased advertising revenue.⁸⁰ There was also the potential that the event would increase sales of user-posted patterns and books linked on

75. Crafting and watching television “together” is a pastime that is perhaps uniquely attractive to knitters. In late 2012 a popular yarn shop announced on Ravelry.com a “Downton Abbey Mystery [Knit-Along],” with the goal of knitting an Edwardian lace garment. *See Downton Abbey Mystery KAL with Jimmy Beans Wool*, RAVELRY, <http://www.ravelry.com/patterns/library/downton-abbey-mystery-kal-with-jimmy-beans-wool> (last visited Feb. 24, 2013). The knit-along, “in celebration of season 3 of Downton Abbey,” the popular British television program, was timed to start with the premier episode (“we can all cast on together”), with additional instructions to be released timed to each episode of the season. *Id.* Participants were encouraged to purchase specially dyed yarn to complete the project. *Id.*

76. *See Selvedge, Updates and Breaking News*, RAVELRY (July 16, 2012), <http://www.ravelry.com/discuss/ravellenic-games-2012/2092771/51-75> (posting) (membership required for access).

77. *See, e.g., Fosterson, Team Tentacular!*, RAVELRY (July 28, 2012), <http://www.ravelry.com/discuss/ravellenic-games-2012/2225037/26-50> (posting) (“Phew! Just got home from our epic Olympic Opening Ceremonies knitting party!”).

78. *Ravennell Games 2012*, *supra* note 70 (containing a “live coverage!” tab).

79. In some ways the fan-driven nature of Ravelympics and the hypothetical “Lagerlympics” both tap into similar public energy, which has been deemed appropriate in other circumstances. For example, in *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302 (9th Cir. 1992), a pop group protested a newspaper contest that invited fans to call a toll number to vote for the “hottest” member of the group, with profits designated to go to charity. The court found that the newspaper’s actions qualified as fair use and did not infringe the group’s trademark.

80. *See supra* notes 60–61 and accompanying text.

Amazon.com, boosting commission income.⁸¹ But Ravelry.com did not sponsor or organize Ravelympics, nor did it sell or provide any goods or services to those participating in Ravelympics as a condition of, or in exchange for, participating in Ravelympics.⁸²

In both 2008 and 2010, Ravelry.com did sell a commemorative pin tied to the Ravelympics events. Each pin featured a dog, the mascot of Ravelry.com, who in 2008 sported a laurel wreath and in 2010 wore a knitted cap and a gold medallion emblazoned with a ball of yarn and the year.⁸³ The 2010 pin was named the “2010 Ravelympic Badge of Glory,” and priced at \$6. Fifty percent of the sale proceeds were to be donated to the Special Olympics; reportedly over \$3200 was raised.⁸⁴ The pins contained no Olympic trademarks or words, nor did they contain the word Ravelympic, although the words “Special Olympics” appeared in the 2010 product description.⁸⁵ The sale of the pin was completely separate from the Ravelympic group activity in important respects: it was sold by Ravelry.com, not the group, and anyone could buy the pin, whether or not they participated in Ravelympics, or even knew what it was about.⁸⁶ While the Ravelry.com membership runs to the millions, only a few thousand pins were produced and sold.⁸⁷

In the Ravelry.com community, there was no confusion between the knitting activities and the activities of the Olympic Games, or about who was sponsoring the event—users of

81. *See id.*

82. *But see Ravellenic Games 2012*, *supra* note 70 (“PLEASE NOTE The Ravellenics are a subsection of Ravelry. As such, the Ravelry community guidelines apply to this group.”).

83. *See 2010 Badge of Glory*, RAVELRY, <http://www.ravelry.com/stores/ravelry-merch-store/products/30205> (last visited Mar. 19, 2013) (reproduced at Appendix I); *2012 Ravellenic Games Badge of Glory*, RAVELRY, <http://www.ravelry.com/stores/ravelry-merch-store/products/110845> (last visited Mar. 19, 2013) (containing a picture of the 2008 pin and reproduced at Appendix I).

84. *2010 Badge of Glory*, *supra* note 83 (“50% of the profits from this pin are donated to the Special Olympics! \$3200 has been donated to date.”).

85. *Id.*; *2012 Ravellenic Games Badge of Glory*, *supra* note 83.

86. Knitters have a curious addiction to commemorative pins and buttons. Attendees at knitting conferences, workshops, and conventions commonly display pins from prior events. At the time of this writing, Ravelry.com was accepting orders for the “2012 Ravellenic Games Badge of Glory” Pin. *See 2012 Ravellenic Games Badge of Glory*, *supra* note 83.

87. *See id.*

Ravelry.com. However, the USOC took a markedly different view of the Ravelympics. While the 2008 and 2010 events escaped censure, the 2010 enamel pin associated with the 2010 group event was targeted in a 2011 USOC cease-and-desist letter. In response to the letter, Ravelry.com apparently dropped the word “Ravelympics” from the merchandise webpage.⁸⁸ The merchandise webpage continued to note the donation to Special Olympics.⁸⁹

The 2012 Ravelympics event was the subject of considerably greater USOC ire, perhaps because the USOC lawyers mistakenly believed that its prior objection to Ravelry.com about the sale of the pin had been understood to cover all uses of the word “Ravelympic,” including the separately organized user event.⁹⁰ The USOC also had a mistaken view of the impact of its 2011 communication; its representatives apparently believed that Ravelry.com had “removed the pin from its website,” instead of merely removing the word “Ravelympic” from the merchandise page, perhaps making what the USOC viewed as a renewal of challenged activity even more objectionable.⁹¹ Whatever the cause, the 2012 cease-and-desist letter was withering, despite its self-characterization as being “amicable”:

The athletes of Team USA have usually spent the better part of their entire lives training for the opportunity to compete at the Olympic Games and represent their country in a sport that means everything to them. For many, the Olympics represent the pinnacle of their sporting career. Over more than a century, the Olympic Games have brought athletes around the world together to compete in an event that has come to mean much more than just a competition between the world’s best athletes. The Olympic Games represent ideals that go beyond sport to encompass culture and education, tolerance and respect, world peace and harmony.

88. See *USOC Notice*, *supra* note 65.

89. See *2012 Badge of Glory*, *supra* note 83.

90. The reaction and reasoning of Ravelry.com organizers are not documented on the site with regard to the 2011 dispute as they are with the 2012 dispute.

91. According to the 2012 USOC letter,

[i]n March 14, 2011, my colleague, Carol Gross, corresponded with your attorney, Craig Selmach [sic], in regard to a pin listed as the “2010 Ravelympic Badge of Glory.” At that time, she explained that the use of RAVELYMPIC infringed upon the USOC’s intellectual property rights, and you kindly removed the pin from the website. I was hoping to close our file on this matter, but upon further review of your website, I found more infringing content.

USOC Notice, *supra* note 65 (alteration in original).

The USOC is responsible for preserving the Olympic Movement and its ideals within the United States. Part of that responsibility is to ensure that Olympic trademarks, imagery and terminology are protected and given the appropriate respect. We believe using the name “Ravelympics” for a competition that involves an afghan marathon, scarf hockey and sweater triathlon, among others, tends to denigrate the true nature of the Olympic Games. In a sense, it is disrespectful to our country’s finest athletes and fails to recognize or appreciate their hard work.

It looks as if this is the third time that the Ravelympics have been organized, each coinciding with an Olympic year (2008, 2010, and 2012). The name Ravelympics is clearly derived from the terms “Ravelry” (the name of your website) and OLYMPICS, making RAVELYMPICS a simulation of the mark OLYMPIC tending to falsely suggest a connection to the Olympic Movement. Thus, the use of RAVELYMPICS is prohibited by the Act. Knowing this, we are sure that you can appreciate the need for you to re-name the event, to something like the Ravelry Games.⁹²

In addition, the USOC letter demanded that Ravelry.com remove from its site certain postings, including patterns, identified as infringing USOC trademarks or words by either using the word “Olympic” or “Olympic terminology” in its title or description, or by including a depiction of the Olympic rings in the design. The non-exhaustive list of postings offered by the USOC included:

- A dishcloth with five interlocking rings (no colors) and the year;
- A hat inspired by one worn by an Olympic athlete (mentioned by name) and including five interlocking rings (in color) and the text “USA”;
- A dishcloth with five interlocking rings (no colors) and the silhouette of a swimmer;
- A hat inspired by one worn by an Olympic athlete (mentioned by name in the posting) and featuring “USA 2010” as its design; and
- A crocheted necklace of five interlocking rings (with color).⁹³

Some of the identified postings included knit and crochet patterns which were available for free, others for \$1–2 per download; at least one posting reportedly offered no pattern, just a picture and description of a completed project.⁹⁴

92. *Id.*

93. *See id.* At the time of this writing, some of the postings had been changed from how they existed at the time of the USOC letter; some had not. The author attempted, with limited success, to contact users for a description of the pages in their original form to create this list.

94. *Id.* (follow hyperlinks contained in the notice).

Ironically, one dishcloth design was sold by a person who marketed the pattern as an effort to offset the costs of being a volunteer worker at the 2010 Vancouver Winter Olympics.⁹⁵ The USOC letter made no apparent distinction between patterns for sale, patterns shared for free, and postings sharing completed projects without sharing the pattern:

The USOC relies upon official licensing and sponsorship fees to raise the funds necessary to fulfill its mission. Therefore, the USOC reserves use of Olympic terminology and trademarks to our official sponsors, suppliers and licensees. The patterns and projects featuring the Olympic Symbol on Ravelry.com's website are not licensed and therefore unauthorized. The USOC respectfully asks that all such patterns and projects be removed from your site.

For your convenience, we have listed some of the patterns featuring Olympic trademarks. However, this list should be viewed as illustrative rather than exhaustive. The USOC requests that all patterns involving Olympic trademarks be removed from the website. We further request that you rename various patterns that may not feature Olympic trademarks in the design but improperly use Olympic in the pattern name.⁹⁶

Ravelry.com organizers posted the letter, explaining to the Ravelympic group moderators and participants that "it's looking like we may have to rename the Ravelympics Don't worry[—]worst case, they force us to ask the Ravelympic [moderators] to change the name of their group and the event. That's all."⁹⁷

If the USOC thought this was a run-of-the-mill business letter, and the Ravelry.com organizers thought this was an inconvenience easily handled, they were both wrong. The community went, in the words of one observer, "batsh*t insane."⁹⁸ The controversy was reported by major news outlets,

95. *Vancouver 2010 Olympic Dishcloth*, RAVELRY, <http://www.ravelry.com/patterns/library/vancouver-2010-olympic-dishcloth> (last visited Mar. 6, 2013).

96. *USOC Notice*, *supra* note 65.

97. *Id.*

98. Stephanie Pearl-McPhee, *Now That You Ask*, YARN HARLOT (June 21, 2012), http://www.yarnharlot.ca/blog/archives/2012/06/21/now_that_you_ask.html. The Yarn Harlot, aka Stephanie Pearl-McPhee, was one of the Ravelympic organizers, and described the experience:

Yesterday, right out of the blue, my inbox filled up and there were many tweets and things got really, really crazy, really really fast. It turns out that the USOC (United States Olympic Committee) has asked Ravelry to take down infringing patterns and stuff, and to change the name of the Ravelympics, because the US Congress has granted them the exclusive commercial right to the trademarks. I guess that might have gone over okay, but in the letter it said that they the USOC believes that "a competition that involves an afghan marathon, scarf hockey and sweater triathlon, among others, tends to

posted on blogs, and trended on Facebook and Twitter.⁹⁹ The USOC pages were flooded by angry postings,¹⁰⁰ and as a result it suffered a hit to its good will just before athletes were set to travel to London.¹⁰¹ Ravelympics was renamed the Ravellenic Games.¹⁰² The USOC eventually apologized for the tone of its letter, if not its intent.¹⁰³ What happened to take this situation out of the realm of the ordinary?

III. CAN THEY DO THAT? UNDERSTANDING THE LEGAL REACH OF THE USOC

Starting this analysis with a discussion of the ability of the USOC to take the action it did may risk readers concluding that Ravelry.com members and other crafters are hostile to intellectual property law. It would be a mistake to believe such a predisposition is endemic in the knitting community for a variety of reasons.¹⁰⁴ Knitters are selfish: we know that for

denigrate the true nature of the Olympic Games. In a sense, it is disrespectful to our country's finest athletes and fails to recognize or appreciate their hard work."

I could be wrong, but I'm pretty sure that right then - that's when the knitters went - to use a technical term, bash*t insane.

All of a sudden I was getting a lot of mail, and seeing a lot of tweets, and a lot of them were telling me that I was going to have to DO SOMETHING, and asking me what I thought.

Id.

99. See Memmott, *supra* note 23 (discussing how people complained on USOC's Facebook page); Pearl-McPhee, *supra* note 98 (discussing how there were "many tweets" about the incident).

100. See, e.g., Memmott, *supra* note 1 (discussing how angry knitters left messages for the USOC on Facebook, Twitter, and by email).

101. See Macur, *supra* note 1 (discussing how the USOC "offended thousands, if not millions," of people). USOC cease-and-desist letters are often a subject of interest. For example, in August 2012 the *Daily Show* featured a spoof report of "The Double-Wide World of Sports" to highlight a USOC challenge to an event originally marketed as "The Redneck Olympics." *The Daily Show: Episode No. 17138* (Comedy Central television broadcast Aug. 9, 2012), available at http://www.thedailyshow.com/videos/?date=2012-08-09&end_date=2012-08-09.

102. See Kimberli, *Memorial & ReNaming Special Ceremony*, RAVELRY (June 26, 2012), <http://www.ravelry.com/discuss/ravellenic-games-2012/2196663> (comment) (membership required for access).

103. *Statement from USOC Spokesperson Patrick Sandusky*, TEAM USA (June 21, 2012, 12:07 PM), <http://www.teamusa.org/News/2012/June/21/statement-from-usoc-spokesperson-patrick-sandusky.aspx>.

104. These personal assertions are admittedly completely unquantifiable and unverifiable. See Kimberli, *supra* note 102 (discussing how the group organizers decided to change the name of the event to Ravellenic Games);

more knitting books to be produced, publishers have to make money selling knitting patterns.¹⁰⁵ We are respectful: we know how hard it can be to create a pattern, so we are not likely to steal it and share it.¹⁰⁶ We are educable: our transgressions are most likely innocent, and our behavior corrected by better information (or a stern warning).¹⁰⁷ Ravelympics is, after all, no longer called Ravelympics in part because of the willingness of both the website and the organizers to respond to the USOC concerns.

Yet it is actually the quick resolution of this dispute in the favor of the USOC that makes this inquiry worthwhile. Relatively few cases test the authority of the USOC in its execution of its enhanced powers to protect its trademarks and words; most accused infringers fold soon after receipt of a cease-and-desist letter.¹⁰⁸ Like any corporation in similar circumstances, the USOC uses cease-and-desist letters to present a *belief* of infringement,¹⁰⁹ and we should test the USOC claims of infringement against the applicable legal standards. But the USOC is also unlike any other corporation.

USOC Notice, *supra* note 65 (showing the tone of the posting to be conciliatory); Pearl-McPhee, *supra* note 98 (helping readers understand what the USOC was doing, but also sympathetic to their anger).

105. See Casey, *supra* note 60.

106. We are much more likely to believe, correctly or not, that a design is completely derivative, and we can create a similar item better ourselves *without* a pattern. See Holly Shaltz, *HJS Studio Tutorial: Design Your Own Knitting Pattern*, HJS STUDIO, <http://www.hjsstudio.com/designknit.html> (last visited Apr. 15, 2013).

107. A helpful example on a FAQ page of a website to promote an event for those who love knitting socks:

May I have your permission to use your logo to make Sock Summit Souvenirs?

Nope. Sorry guys, but the Sock Summit logo is the trademarked logo of an actual real live corporation called "Sock Summit LLC". Vendors are welcome to generate their own commemorative Sock Summit colourways, but we would like them to be "inspired by" rather than reproduced efforts. We love creativity, but we are also a business.

The button-logo that we've given you to use as a blog button is cool to use that way, but please restrain yourself from putting it on stuff you want to sell. It belongs to us, and we'll be making available a variety of souvenirs (tee-shirts, mugs, bags etc.) available to you. Thanks for helping make this a proper business that we can do it again.

Frequently Asked Questions, SOCK SUMMIT 2011, <http://www.socksummit.com/faqs> (last visited Feb. 24, 2013).

108. See *supra* note 10 and accompanying text.

109. See *USOC Notice*, *supra* note 65.

According to its letter, it views itself as carrying out a quasi-public responsibility to “ensure that Olympic trademarks, imagery and terminology are protected and given the appropriate respect.”¹¹⁰ In light of its extraordinary trademark enforcement powers, it is even more important that its efforts be scrutinized for overreaching.

A. UNDERSTANDING THE ASA FRAMEWORK

The ASA granted to the USOC exclusive rights to use certain enumerated words, symbols and emblems closely associated with the International Olympic movement, including:

- (1) the name “United States Olympic Committee”;
- (2) the symbol of the International Olympic Committee, consisting of 5 interlocking rings . . . ;
- (3) the emblem of the corporation [USOC] . . . ; and
- (4) the words “Olympic”, “Olympiad”, [and] “*Citius Altius Fortius*” . . .¹¹¹

In addition to the authority to enter into licensing with suppliers and sponsors,¹¹² the ASA allows the USOC to “file a civil action against a person for the remedies provided in the Act of July 5, 1946 . . . popularly known as the [Lanham] Trademark Act” for unauthorized use of the trademarks or words, or a “combination or simulation of those words tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with the [USOC].”¹¹³

110. *Id.*

111. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(a) (2006). “*Citius Altius Fortius*” is Latin for “Faster Higher Stronger,” the Olympic motto. THE OLYMPIC MUSEUM, THE OLYMPIC SYMBOLS 1, 5 (2007), available at http://www.olympic.org/Documents/Reports/EN/en_report_1303.pdf.

112. 36 U.S.C. § 220506(b) (2006).

113. 36 U.S.C. § 220506(c) (2006). In its entirety:

Civil Action for Unauthorized Use.—Except as provided in subsection (d) of this section, the corporation may file a civil action against a person for the remedies provided in the Act of July 5, 1946 (15 U.S.C. 1051 et seq.) (popularly known as the Trademark Act of 1946) if the person, without the consent of the corporation, uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition—

- (1) the symbol described in subsection (a)(2) of this section;
- (2) the emblem described in subsection (a)(3) of this section;
- (3) the words described in subsection (a)(4) of this section, or any combination or simulation of those words tending to cause confusion

Although at first glance the ASA appears to prohibit any and all unauthorized use of the protected words or marks, or their simulation, the enforcement powers of the USOC are only triggered by infringing uses “for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition”¹¹⁴ In short, the ASA reserves to the USOC specific commercial uses of the words and marks of the Olympics; fair use in the form of scholarly writing, reporting, and everyday use in public discourse falls outside of these protections.¹¹⁵ Accordingly, the word “Olympics” and even the disputed “Ravelympics” can be used in this article without USOC approval, and news agencies can report on Olympic events freely.¹¹⁶

Three cases helpfully elaborate on the required element that the speech be used without authorization “for the purpose of trade, [or] to induce the sale of any goods or services”¹¹⁷ and therefore restricted by the ASA. In *Stop the Olympic Prison v. U.S. Olympic Committee*,¹¹⁸ a community group sought a declaratory judgment after receiving a USOC demand to refrain from using the word “Olympic” and the Olympic rings in fliers and advertisements.¹¹⁹ The group was organized to protest the proposed use of Olympic facilities in Lake Placid as

or mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic, Paralympic, or Pan-American Games activity; or

(4) any trademark, trade name, sign, symbol or insignia falsely representing association with, or authorization by, the International Olympic Committee, the International Paralympic Committee, the Pan-American Sports Organization, or the corporation.

Id.

114. *Id.* Accordingly, the USOC letter’s assertion that Ravelympics is a simulation, and “[t]hus, the use of RAVELYMPICS is prohibited by the Act,” is patently wrong. *See also infra* Part III.D (discussing the application of the ASA to “Ravelympics”).

115. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 565 (1987) (Brennan, J., dissenting) (discussing how fair use prevents trademark law from regulating a lot of noncommercial speech).

116. *See, e.g., Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112, 1119 (S.D.N.Y. 1980). Ironically, an offended knitter could create and promote a webpage advocating the inclusion of knitting as an Olympic sport, listing the exact Ravelympic events as the aspirational qualifications of Olympic knitters, to parody the Olympic movement (and the USOC), and that commentary would be beyond the reach of USOC objection. *See generally id.* (discussing how noncommercial speech falls outside ASA protections).

117. 36 U.S.C. § 220506(c) (2006).

118. *Stop the Olympic Prison*, 489 F. Supp. at 1112.

119. *Id.* at 1116.

a prison at the conclusion of the 1980 Winter Games.¹²⁰ The community group prevailed.¹²¹ The district court noted:

Notwithstanding the broad wording of [the Act], it cannot be interpreted to mean that only the defendant and its licensees may use the word "olympic" and the enumerated symbols for any purpose whatsoever. Surely the news media are entitled to report about the Olympic competitions, which would almost of necessity entail use of the word "olympic" and photographs of the competition likely to contain some of the symbols. . . . [I]t appears that Congress' objective has been to prevent the deceptive or confusing use of . . . mottoes, emblems, and the like by unauthorized persons.¹²²

In further appreciation of the required nexus to trade, the district court pointed out that even if it were to find the group's poster *sales* violated the USOC's rights, *free* distribution of the offending poster would be beyond the reach of the statute.¹²³

The Supreme Court subsequently agreed, in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*,¹²⁴ that the ASA "primarily applies to all uses of the word 'Olympic' to induce the sale of goods or services."¹²⁵ Because that application of the ASA works to limit "commercial speech,"¹²⁶ the Court accepted that the limit "may exceed" acceptable limitations on other types of speech protected by the First Amendment.¹²⁷ The District Court of Colorado more recently elaborated on the Court's holding that the primary target of the ASA is "commercial speech" in *U.S. Olympic Committee v. Am. Media, Inc.*¹²⁸ The court held that a publishing company's sale of a guide to the Sydney Olympic Games entitled "OLYMPICS USA" was not commercial speech under the relevant doctrine because even though the guide was sold for a profit, the references to the Olympics were not themselves an advertisement and did not purport to advertise goods or services related to the Olympics.¹²⁹

120. *Id.* at 1115.

121. *Id.* at 1126.

122. *Id.* at 1119–20.

123. *Id.* at 1121 n.27.

124. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).

125. *Id.* at 539.

126. *Id.* at 535.

127. *See id.* at 539–40.

128. *U.S. Olympic Comm. v. Am. Media Inc.*, 156 F. Supp.2d 1200, 1200 (D. Colo. 2001).

129. *Id.* at 1207–09.

The ASA also grants power to the USOC to limit speech, even where there is no connection to trade, in the form of unauthorized promotional uses of the word Olympic “only when the promotion relates to an athletic or theatrical event.”¹³⁰ The Supreme Court held that a San Francisco group’s proposed international event named the “Gay Olympic Games” infringed on the USOC’s statutory rights to protect both against unauthorized commercial use and unauthorized use to promote an athletic event.¹³¹ The Court also held that, unlike trademark claimants, the statutory rights granted by the ASA do not require the USOC to demonstrate that the word “Olympic” is likely to cause confusion.¹³² It further held that the USOC may seek vindication of these rights without violating the First Amendment, even in circumstances implicating noncommercial speech, as long as the use of the protected words falls within the commercial activity protected by the ASA.¹³³

Importantly, the USOC is statutorily required to show that “a combination or simulation” of protected words tend to “cause confusion or mistake,” are deceptive, or “falsely suggest a connection with the,” USOC or Olympics before it can attempt to stop that use,¹³⁴ a burden it does not face when the protected words are used in trade without alteration.¹³⁵ The authority granted to the USOC is therefore dependent upon the circumstances of the alleged infringement: using protected

130. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 540. It should be noted that the interpretation that the “only” noncommercial speech protected is speech promoting athletic or theatrical events is arguably narrower than the statutory prohibition as written, which could be read as prohibiting the use in any competition whether or not it is theatrical or athletic in nature. *See supra* note 113 and accompanying text.

131. *S.F. Arts & Athletics, Inc.*, 483 U.S. at 539–41. More controversially, the Court concluded that “Gay Olympic Games” did not warrant First Amendment protection. *Id.* at 541.

132. *Id.* at 530. This interpretation has been criticized by some scholars. *See, e.g.,* Craig Colbrook, *Gold Meddling: How the U.S. Olympic Committee Overprotects the Olympics Brand*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 57, 67 (2008) (discussing how if there was no confusion with the use of the word “Olympic” then the USOC would not be injured).

133. *See S.F. Arts & Athletics, Inc.*, 483 U.S. at 541. This conclusion was based in part on the majority’s conclusion that the USOC is not a state actor. *Id.* at 547. The dissent vigorously disputed both conclusions. *Id.* at 548–49, 560–61 (Brennan, J., dissenting).

134. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(c) (2006); *cf.* Memorandum, *supra* note 10, at 2 (holding that “Camp Olympik” necessitated review that the simulation did not “falsely suggest an association with” the Olympic Games).

135. *See* 36 U.S.C. § 220506(c) (2006).

words or symbols in trade or to promote theatrical or athletic events versus using them for some other purpose, or using them unaltered versus in combinations or simulations.

While any use of the word "Olympic" triggers its protections, the ASA, by not prohibiting all simulations but only those that are confusing or deceptive, requires an examination of something more: the context of use. In *U.S. Olympic Committee v. Tobyhanna Camp Corp.*,¹³⁶ the USOC claimed that a private camp's use of a simulation of "Olympic" and a variation on the Olympic rings to promote a children's sports camp violated rights protected by the ASA.¹³⁷ In judging whether "Camp Olympik" indeed was an improper simulation, the district court stressed the importance of the entire context.¹³⁸ The court found a close similarity between "Olympic" and "Olympik," and between the protected interconnected five rings and the camp's design of five unjoined rings and a torch.¹³⁹ Given the camp's sports theme, the court concluded these choices deliberately and falsely suggested a connection with the Olympic Games, triggering the protections of the ASA.¹⁴⁰

Although not dealing with simulations, other courts have also discussed how context alleviates or adds to Olympic brand confusion; for example, in *Stop the Olympic Prison*, the district court noted that the nature of the citizen's protest (about the conversion of Olympic facilities for prison use) and the content of its associated posters (featuring prison bars) adequately distinguished between the Olympic Games activities and the debate about the use of Olympic facilities at the conclusion of the games.¹⁴¹ On the other hand, the Supreme Court in *San Francisco Arts & Athletics* pointed to the athletic nature of the proposed "Gay Olympic Games," which included many events then found in the Olympics, and its stated desire to recruit as participants top athletes from around the world, as points

136. Memorandum, *supra* note 10, at at 1.

137. *Id.* at 2.

138. *Id.* at 3.

139. *Id.*

140. *Id.*

141. See *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112, 1123 (S.D.N.Y. 1980).

tending to confuse the public or suggest a connection to the official Olympic movement.¹⁴²

B. DISTINGUISHING LANHAM

It is helpful to compare the protections offered by ASA and the Lanham (Trademark) Act for this analysis in order to understand how they relate to each other because the ASA provides protections that are distinct from the analogous provisions found in the Lanham Act.¹⁴³ Notably, under the Lanham Act, the unauthorized “use[] in commerce” of trademarked words and symbols is actionable if that use is “likely to cause confusion, or to cause mistake.”¹⁴⁴ In comparison, under the ASA, any unauthorized use of a protected word or symbol in trade “to induce the sale of any goods or services,” is actionable without any further requirement related to confusion.¹⁴⁵ Thus, as noted by case law, on its face, the ASA offers stronger protections of the special Olympic words and marks.¹⁴⁶ However, the use of a combination or simulation of the words in trade “to induce the sale of any goods or services” is actionable only if the combination or simulation “tend[s] to cause confusion or mistake,” or in some way deceptively or falsely suggests a connection with the Olympic Movement.¹⁴⁷ The protection of simulations was thus written in a way that more closely tracks the protections of the Lanham Act.

Other important points of reference are the standards used to assess infringement. Here, the distinctions between the ASA and the Lanham Act are less clear. There are facial differences in the statutory language; notably the ASA protections are triggered by specific commercial activity to “induce the sale of any goods or services,”¹⁴⁸ a class of activity that is arguably

142. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 538–41 (1987).

143. Lanham (Trademark) Act, 15 U.S.C. § 1051–1141n (2006).

144. See 15 U.S.C. § 1125(a).

145. See *Ted Stevens Olympic and Amateur Sports Act*, 36 U.S.C. § 220506(c) (2006).

146. See *S.F. Arts & Athletics, Inc.*, 483 U.S. at 530 (“The protection granted to the USOC’s use of the Olympic words and symbols differs from the normal trademark protection in two respects: the USOC need not prove that a contested use is likely to cause confusion, and an unauthorized user of the word does not have available the normal statutory defenses.”).

147. See 36 U.S.C. § 220506(c)(3).

148. 36 U.S.C. § 220506(c).

more limited than the broader description of commercial activity under the Lanham Act.¹⁴⁹ However, cases applying the ASA have often read the ASA as being triggered by “commercial activity” and have applied established trademark and other precedents in a way that tends to eliminate any practical distinction between the statutory provisions.¹⁵⁰ There is limited case law interpreting the ASA requirement that a simulation must “tend[] to cause confusion,”¹⁵¹ but it is insufficient to provide a basis for understanding if that standard would be similarly conflated with its Lanham Act analogue “likely to cause confusion.” However, it seems more likely than not that those standards will also be viewed by courts as functionally equivalent. So while the courts continue to recognize distinctions in the circumstances triggering the protections of the ASA, it is most likely that the key elements in assessing actual infringement will be interpreted in a manner that is consistent with current understandings of how analogous provisions are understood in trademark law. Because the commercial use standard has been applied somewhat inconsistently by courts applying the Lanham Act to internet activity,¹⁵² this adds an element of uncertainty to steps in the analysis where the result is determined by a close question of whether the activity is for purposes of trade, for some other commercial purpose, or for no trading or commercial purpose.

One last important point of interest is the extent to which the Lanham Act may supplement the protections of the ASA. Courts have asserted, without analysis,¹⁵³ that the USOC could

149. 15 U.S.C. § 1125(a) (2006) (“on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof . . .”).

150. See, e.g., *U.S. Olympic Comm. v. Olympic Supply, Inc.*, 655 F. Supp. 2d 599, 606 (D. Md. 2009) (“[T]he OASA grants the USOC ‘the right to prohibit certain commercial and promotional uses of the word ‘Olympic’ and various Olympic symbols . . . [I]ts application is to commercial speech.” (citing *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 526, 535 (1987))).

151. See, e.g., Memorandum, *supra* note 10.

152. See Margreth Barrett, *Domain Names, Trademarks and the First Amendment: Searching for Meaningful Boundaries*, 39 CONN. L. REV. 973, 985 (2007) (“[A]t least in the Internet context, recent court decisions have stretched the traditional understanding of ‘use in Commerce’ (and its subcomponent ‘trademark use’) practically beyond recognition.”).

153. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 573 fn.20 (1987) (“Congress refers to the USOC’s authority over the use of ‘Olympic’ as a matter separate from the USOC’s authority to enforce its trademarks.”). The USOC’s ability to rely on the Lanham Act does not appear

separately invoke all available Lanham Act protections,¹⁵⁴ based on the USOC's steps to register the marks and words for trademark protection.¹⁵⁵ Reliance on the Lanham Act would theoretically open up additional theories of infringement to the USOC, including dilution (unauthorized use that diminishes the uniqueness of a mark) and unfair competition.¹⁵⁶ Because the focus of the USOC cease-and-desist letter is the unauthorized use of protected words and marks, as prohibited by the ASA,¹⁵⁷ the following analysis will parallel the claims

to have been challenged. The 1998 amendment of the ASA, which provides that "the corporation may file a civil action against a person for the remedies provided [in the Lanham] Act" differs from prior language which stated the violations of certain protections "shall be subject to suit in a civil action by the Corporation for the remedies provided in the [Lanham] Act." *Compare* Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045, 3048, *with* Patriotic and National Observances, Ceremonies, and Organizations, Pub. L. No. 105-225, 112 Stat. 1253, 1469 (1998). This difference might be understood as an attempt to more firmly establish the ASA as the statutory source of rights in words and marks and to rely on the Lanham Act only as a source of remedies to vindicate those rights. That interpretation would be consistent with Congress' decision to set forth a substantially different legislative framework and not merely rely on the Lanham Act. It would also be consistent with the Supreme Court's suggestion (and the ASA's acknowledgment) that the words may still have some generic value. *See S.F. Arts & Athletics*, 483 U.S. at 532-34 ("There is no need in this case to decide whether Congress ever could grant a private entity exclusive use of a generic word," because Congress could reasonably find that the word "Olympic" had "acquired what in trademark law is known as a secondary meaning . . . The right to adopt and use such a word to distinguish the goods or property of the person whose mark it is, to the exclusion of use by all other persons, has been long recognized.").

154. *See, e.g.,* U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200, 1209 (D. Colo. 2001) (holding that the USOC can pursue trademark claims arising in certain settings: "The Lanham Act is available to prevent this type of wrongdoing, but it requires a claimant to prove its charge. If, therefore, the USOC holds traditional trademark rights to its marks, it can defend those rights under the Lanham Act. Thus if the USOC is correct in its assertion that 'use of its marks in a trademark sense . . . suggest[s] official endorsement, authorization, or involvement by the USOC,' it can pursue those claims under the Lanham Act.").

155. Provisions relating to the registrations of trademarks can be found at 15 U.S.C. § 1051 (2006).

156. *See* 15 U.S.C. § 1125(c) (2006) (dilution); 15 U.S.C. § 1125(a) (2006) (unfair competition).

157. "Thus, the use of RAVELYMPICS is prohibited by the Act." *USOC Notice*, *supra* note 65. The letter made only a passing reference to other causes of action: "These marks therefore are protected under the Lanham Act . . . Thus, Ravelry.com's unauthorized use of the mark OLYMPIC or derivations thereof, such as RAVELYMPICS, may constitute trademark infringement, unfair competition, and dilution of our famous trademarks." *Id.*

actually presented by the USOC, without attempting to predict or respond to claims of dilution or unfair competition.

C. THE ASA APPLIED TO PATTERNS AND POSTINGS

A careful examination of the patterns and postings identified by the USOC reveals that they embody a range of uses of the protected words and marks. The cease-and-desist letter characterized the patterns and postings simply, asserting that they all represented unauthorized use because “the USOC reserves use of Olympic terminology and trademarks to our official sponsors,”¹⁵⁸ and demanding the removal of all patterns (listed or not) “involving Olympic trademarks” and the renaming of all patterns (listed or not) “that improperly use Olympic in the pattern name.”¹⁵⁹ The USOC’s characterization of patterns and postings was based solely on the use of protected words or marks in the pattern or description, an approach that obscures the relevant circumstances identified as important by the ASA as triggering a remedy for unauthorized use, whether the use is “for the purpose of trade [or] to induce the sale of any goods or services.”¹⁶⁰ The range of user patterns and postings featuring protected words or symbols is more helpfully analyzed using a framework that considers patterns for sale separately from free patterns and postings that use protected words in their title or description, and that also takes into account whether the patterns or posted projects themselves incorporate protected words or symbols. Only when the factual circumstances are mapped against ASA provisions can we assess how the demands measure up against the law. The following table illustrates this framework:

Commercial activity level	Unauthorized use
Patterns for sale, promoted using the word “Olympic”	Pattern contains Olympic rings or word “Olympic”
	Pattern does not contain Olympic rings or word “Olympic”

158. *Id.*

159. *Id.*

160. 36 U.S.C. § 220506(c) (2006).

Free patterns, promoted using the word "Olympic"	Pattern contains Olympic rings or word "Olympic"
	Pattern does not contain Olympic rings or word "Olympic"
Postings of completed projects promoted using the word "Olympic"	Posted project may or may not contain Olympic rings or word Olympic

1. Patterns for Sale

Patterns for sale that are promoted using the word "Olympic,"¹⁶¹ which includes patterns that incorporate either the word "Olympic" or the Olympic rings in the pattern,¹⁶² run afoul of the ASA.¹⁶³ Remember, under both the statute and current case law the USOC need not demonstrate that my sale of "Marcella's pattern for an Olympic scarf" is likely to create confusion in the mind of the consumer.¹⁶⁴ In order to prevail, it need only demonstrate the unauthorized use of the word "Olympic" or the protected Olympic rings "for the purpose of trade, to induce the sale of any goods or services."¹⁶⁵ The sale of patterns which in any way use the protected words or marks, whether in promotion, description or pattern content, infringes on the USOC's statutory rights; thus, those patterns should be

161. "Promoted using the word 'Olympic'" is not a statutory requirement, but rather a technological concern: for the pattern to be discovered by searching for the term "Olympic," it is necessary that the term be in the description, title, or tags of the posting. Similar patterns for sale that do not use the word "Olympic" in their marketing materials, but that contain protected words or marks in their designs, would be equally infringing and subject to a similar analysis, but they would be rendered irrelevant by their lack of discoverability and relative obscurity.

162. In knitting parlance, to say that the pattern contains the word "Olympic" or the Olympic rings means the pattern instructions reproduce the word or symbol, contain instructions on how the user can produce the word or symbol in the finished product (typically in the form of charted instructions), or both.

163. See 36 U.S.C. § 220506(c) (2006) (describing the circumstances under which symbols, emblems, words, and other marks associated with the Olympic Games are deemed to infringe upon the USOC's exclusive right to use those designations).

164. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 530 (1987) (noting that, unlike the Lanham Act, the ASA does not require the USOC to prove a likelihood of confusion to establish infringement for use of the word "Olympic").

165. See *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200, 1207 (D. Colo. 2001) (discussing commercial speech and citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)).

removed from the website, either by the Raverly.com users that posted them or by Ravelry.com.¹⁶⁶

2. Free Patterns and Postings

Another group of easy cases is the broad category of patterns given away for free, whether or not the patterns contain the word “Olympic” or the Olympic rings, and even if the word “Olympic” is used in the promotion of the pattern. Applying the reasoning of *Stop the Olympic Prison*,¹⁶⁷ *San Francisco Arts & Athletics*,¹⁶⁸ and *American Media*,¹⁶⁹ if the use is not for the purpose of trade, it is not subject to Committee authorization.¹⁷⁰ So if I want to post and share, *gratis*, “Marcella’s pattern for an Olympic scarf,” there is no restriction arising under the ASA, and I should be able to vigorously use the word “Olympic” to promote the pattern’s availability. This suggests that the USOC demand overstepped its authority under the ASA.

For the same reasons, I should freely be able to post information about my completed project (e.g., “Look at the cool Olympic scarf I made”) without running afoul of the ASA provisions, even if my posted project incorporates in its design protected Olympic words and marks. This seemed to be acknowledged by the USOC spokesman, who said in an interview that individuals using the Olympic logo “for personal use” to support the Olympic Games was “great.”¹⁷¹

166. The result for patterns for sale should be no different under a Lanham Act analysis, but it is easier to demonstrate infringement associated with the sale of patterns under the ASA, which doesn’t require the USOC to demonstrate likelihood of confusion; thus, the USOC would receive the greatest protections for those patterns under the provisions of the ASA. See *supra* Part III.B.

167. *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112 (S.D.N.Y. 1980).

168. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).

169. *U.S. Olympic Comm. v. Am. Media, Inc.*, 156 F. Supp. 2d 1200 (D. Colo. 2001).

170. See *id.* at 1206–10 (elaborating on elements of commercial speech); *Stop the Olympic Prison*, 489 F. Supp. at 1121 (holding that where posters using the word “Olympic” were available “free of charge” and had not been “sold or distributed commercially” there could be no violation under the ASA).

171. Suddath, *supra* note 23 (“As far as individuals using [the Olympic logo] and supporting the Olympic Games, I think that’s great,” says USOC spokesman Patrick Sandusky. “For personal use. But this is about using our trademark in a commercial way without giving us that information.”). It is not

There are some circumstances however, where examination under a liberal interpretation of the Lanham Act's "commercial use" standard might yield different results. For example, instead of "Marcella's pattern for an Olympic Scarf," submitted by a professor who knits, we might imagine a suite of Olympic-themed patterns offered for free by a professional designer who, having enticed Ravelry.com users to his website, then leverages the opportunity to sell specialty yarn, equipment or other goods. Those circumstances might present an acceptable argument for commercial use. However, that determination would be necessarily context-specific,¹⁷² suggesting that the USOC's blanket demand that *all* patterns for sale violated USOC rights under the ASA or Lanham act was an overstatement, even applying a more liberal understanding of commercial use in the internet context.¹⁷³

3. The Harder Case: Patterns for Sale with Olympic as a Descriptor

A somewhat more conceptually challenging case is presented by the sale of patterns that don't themselves incorporate Olympic marks or words, but merely refer to the Olympics in their promotion. Sometimes these postings can be fairly characterized as both project posting and pattern sale, by including a description that the marketed pattern "was inspired by my experiences attending the 2012 Olympic Games," or by "a hat of the style worn by the Australian Olympic Team." Would it truly be improper for me to sell the pattern for "the sweater I designed for Olympic Bronze Medalist Debi Thomas" even if the design elements referenced no protected words or marks? If the patterns themselves do not include the protected words or symbols (an example being the "USA 2010 hat") should the posting be deemed improper

clear from his statement whether Sandusky appreciated that the scope of the letter included free patterns and postings.

172. That is to say, some patterns may be deemed commercial use and others may not, depending on the facts of each situation.

173. It might also be somewhat difficult for the USOC to demonstrate likelihood of confusion in the case of the distribution of "Marcella's pattern for an Olympic scarf" or the posting of a picture of my completed project. Both the context of Ravelry.com as a craft site and the way it allows users to share their creative processes means the origin of the pattern is always part of the sharing process, making confusion unlikely absent some effort to obfuscate or deceive. While it is possible to imagine a pattern title which does not incorporate origin in the title (e.g., "Cool pattern for an Olympic scarf") the origin would nonetheless usually be revealed through the distribution.

merely because of a factual description of its creative genesis, especially when the description itself implicitly disavows any official connection to the USOC?

The plain language of the ASA would seem to prohibit this use.¹⁷⁴ While the absence of actual or likely confusion might otherwise check an infringement claim under trademark law, the USOC is not required to demonstrate any level of confusion—tendency, likelihood, or actual—under the ASA.¹⁷⁵ Accordingly my scarf pattern for sale that is marketed as “inspired by Olympic athlete Gabby Douglas” is improper, although one “inspired by super athlete Gabby Douglas” would not infringe on USOC’s rights under the ASA.¹⁷⁶ This result is consistent with the protective structure of the ASA. While the odd Olympic-related knitting pattern might seem harmless, what if a commercial enterprise produced and marketed a clothing line “inspired by Olympic athletes”? The ability of the USOC to generate earnings from licensing revenue would be greatly impeded. Under this strict interpretation, the decision would go to the USOC.¹⁷⁷

However, some cases suggest a theory that could lead to a different outcome. In *American Media*, the court considered a newspaper’s publication of a magazine entitled “OLYMPICS USA” and incorporating the Olympic words and marks.¹⁷⁸ The magazine presented layouts which described Olympic events, incorporating descriptions of the events and photos of participating athletes, as well as a broadcast schedule and paid advertisements.¹⁷⁹ The district court applied the stringent three-part test of commercial activity developed by the Supreme Court in *Bolger v. Youngs Drug Products Corp.*,¹⁸⁰ which requires that the objected-to speech constitute an advertisement, make reference to a specific product, and be

174. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(c)(4) (2006).

175. *Id.*

176. *Id.* Of course, Gabby Douglas’ agent would undoubtedly object under a host of state laws.

177. See 36 U.S.C. §§ 220505(c)(3), 22506(b) (“[The USOC has the power to] organize, *finance*, and control the representation of the United States in the competitions and events of the Olympic Games” (emphasis added)).

178. U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200 at 1203 (D. Colo. 2001).

179. *Id.*

180. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

motivated by economic interest.¹⁸¹ Applying the *Bolger* test, the *American Media* court found the USOC objections against the newspaper “meritless,” failing to meet any of the three required elements.¹⁸² Importantly, for the purposes of this analysis, the *American Media* court held that a profit motive (e.g., selling more newspapers) was not by itself enough to render speech commercial.¹⁸³ The court compared American Media’s conduct to that of other publications accused of trademark violations in a variety of contexts, and suggested that the similarity between the content of American Media’s speech (detailing facts about the Olympics and Olympic athletes) and ordinary reporting contained in books, newspapers, and magazines, implicated free speech concerns and made the allegation of profit motivation harder to demonstrate.¹⁸⁴ Under that analysis the fact that “Olympic” is used descriptively in the name of the pattern for sale might not automatically lead to a conclusion of infringement, and other elements, such as First Amendment considerations, might yield a different result.

As noted previously, the ASA offers greater protections than those provided by the Lanham Act, including no requirement that the USOC demonstrate tendency to confuse or likelihood of confusion if the unauthorized use is for trade.¹⁸⁵ However, First Amendment limitations are nonetheless important to both standards, and the argument for interpreting the ASA in a manner that provides greater protection of speech may be particularly compelling in an era where the internet has made self-publication common and blurred the once sharp distinctions between the press and the masses. The

181. *Am. Media*, 156 F. Supp. 2d at 1209.

182. *Id.* at 1207.

183. *Id.*

184. This interpretation is consistent with the holding in *New Kids on the Block v. News America Publishing, Inc.*, in which another district court held that a contest inviting fans of a pop band to call a toll telephone number to vote for their favorite band member did not present a Lanham Act violation absent false and explicit claims of “authorship, sponsorship, or endorsement” on the part of the band. The popularity of the band was treated as a public fact, and even though the newspaper openly traded on the popularity of the band to generate income, those actions were deemed insufficient to trigger Lanham Act protections. *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 309 (9th Cir. 1992) (“Summary judgment was proper as to the first seven causes of action because they all hinge on a theory of implied endorsement; there was none here as the uses in question were purely nominative.”).

185. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(c) (2006); *see also supra* Part III.B.

hypothetical descriptions offered for analysis here (e.g., “the sweater I designed for Olympic Bronze Medalist Debi Thomas”) are more analogous to the kind of fact reporting at issue in *American Media* and has the added virtue of expressly denying “authorship, sponsorship, or endorsement” by the USOC; a court might be persuaded that these mere assertions of fact are not commercial in nature, even though linked to a profit motive. Under this analysis—albeit untested—the question of liability is less certain than suggested by the USOC letter or the statutory provisions.¹⁸⁶

4. Assessing the USOC’s Assertions of Law on Pattern Sales and Postings

In sum, if this case went to court, the USOC would most likely prevail on only some of its claims, limited to those postings relating to the sale of patterns.¹⁸⁷ Informational postings and postings of patterns to be shared for free are not infringing under the ASA, whether or not they use the protected words or marks.¹⁸⁸ Identical postings of patterns and projects would be lawful simply based on whether the pattern offered is shared for free or for money.¹⁸⁹ In the case of hybrid postings, that refer to protected words or marks in their

186. Cf. *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (upholding summary judgment against plaintiff Ginger Rogers who sought trademark remedies against the makers of the film “Ginger and Fred”).

Though First Amendment concerns do not insulate titles of artistic works from all Lanham Act claims, such concerns must nonetheless inform our consideration of the scope of the Act as applied to claims involving such titles. Titles, like the artistic works they identify, are of a hybrid nature, combining artistic expression and commercial promotion. The title of a movie may be both an integral element of the film-maker’s expression as well as a significant means of marketing the film to the public. The artistic and commercial elements of titles are inextricably intertwined. Film-makers and authors frequently rely on word-play, ambiguity, irony, and allusion in titling their works. Furthermore, their interest in freedom of artistic expression is shared by their audience. The subtleties of a title can enrich a reader’s or a viewer’s understanding of a work. Consumers of artistic works thus have a dual interest: They have an interest in not being misled and they also have an interest in enjoying the results of the author’s freedom of expression. For all these reasons, the expressive element of titles requires more protection than the labeling of ordinary commercial products.

Id. (footnotes omitted).

187. See *supra* Part IV.C.1–3.

188. *Id.*

189. *Id.*

description without suggesting sponsorship, but don't incorporate protected words and marks in the design, the outcome is harder to predict. What seems apparent, however, is that to the extent that the USOC challenged all patterns and postings with the word "Olympic," regardless of any nexus to trading purpose, it claimed more than the enforcement rights of the ASA allow.

What explains the overreach of the cease-and-desist letter? This may be attributable to an understandably less-than-perfect appreciation of the differences between postings and sales and other distributions of patterns, and the nuances of Ravelry.com's operations, as discussed later in this article. The USOC may also hope that liberal interpretations of commercial use under the Lanham Act will favorably impact the application of the ASA. However the most likely explanation for claiming legal rights in excess of those afforded by statute is the aggressive business strategy of the USOC. In recent years the USOC has asserted rights beyond the protections granted by the ASA. The USOC would like even closer control of the "Olympic Brand" in order to protect and maximize the revenue stream. It has strenuously complained about admittedly legal commercial activities that, in the view of the USOC, unfairly infringe upon the value of USOC words and marks and consequently on licensing and sponsor income.

For example, in *American Media* the USOC admitted that among its chief concerns was the desire to prevent "ambush marketing," the unauthorized (and uncompensated) association with the Olympic Movement by non-official sponsors in a way that dilutes the impact of paid sponsorship, and thus the marketability of Olympic marks and words.¹⁹⁰ An example of this practice would be if a rival company to Visa credit cards produced and aired television commercials featuring the endorsements of past Olympic champions, without using official words or marks, but nonetheless associating with the goodwill of the Olympics. The USOC is not alone in its efforts to control ambush marketing; an aggressive campaign to defeat it permeates the entire Olympic Movement. For example, 2012 London Olympic ticketholders were warned against bringing or wearing "objects bearing trademarks or other kinds of promotional signs or messages (such as hats, T-shirts, bags,

190. U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200, 1203 (D. Colo. 2001).

etc.) . . . [believed to be] for promotional purposes.”¹⁹¹ Attendees were further prohibited, perhaps unrealistically, from posting photos of the games “on social networking websites and the internet more generally.”¹⁹² Local legislation forbade competing billboards or other advertisements within a certain radius of the games, including on private property.¹⁹³ Food brands of non-sponsors could be confiscated.¹⁹⁴ These restrictions generally protect the interests of official sponsors by ensuring that only their message can be associated with the Olympic Games, but move well beyond protecting against unauthorized use of trademarked materials. The overreach in the Ravelry.com cease-and-desist letter is consistent with this highly protective business plan and efforts to more closely protect the power of the Olympic Brand.

D. THE ASA APPLIED TO RAVELympics

1. Assessing Whether the Ravelympics Simulation Tends to Cause Confusion

The Ravelympics promotion did not use a protected word; rather, as conceded by the USOC in its letter, “Ravelympics is clearly derived from the terms ‘Ravelry’ (the name of your website) and OLYMPICS, making RAVELympics a simulation of the mark OLYMPIC.”¹⁹⁵ Because “Ravelympics” is a simulation, under the ASA there is an additional step in the analysis required for making a determination of infringement. First, the simulation must be determined to be “tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic . . . Games activity.”¹⁹⁶

191. LONDON ORGANISING COMM. OF THE OLYMPIC GAMES, LONDON 2012 TERMS AND CONDITIONS OF TICKET PURCHASE 16 (2012), *available at* http://www.americanbar.org/content/dam/aba/events/entertainment_sports/2012/10/forum_on_the_entertainmentsportsindustries2012annualmeeting/london_2012_ticket_terms_conditions.authcheckdam.pdf.

192. *Id.*

193. Mic Wright, *Whatever You Do, Don't Mention the Olympics!*, THE KERNEL (July 16, 2012), <http://www.kernelmag.com/comment/column/2823/whatever-you-do-dont-mention-the-olympics>.

194. Patrick Collinson, *Olympic Prices Are Hard to Swallow*, GUARDIAN (May 11, 2012), <http://www.guardian.co.uk/money/blog/2012/may/11/olympic-food-prices-hard-to-swallow>.

195. *USOC Notice*, *supra* note 65.

196. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C.

The USOC's assertion that the word "Ravelympics" itself "tend[s] to falsely suggest a connection to the Olympic Movement,"¹⁹⁷ is not supported by the content and context of the word's use. "Ravelympics" undeniably evokes the Olympics. The nature of the simulation and the ubiquitous nature of the word "Olympic" make the association inevitable. Indeed, it seems to have been chosen for the very purpose of encouraging an extraordinary effort and the achievement of a personal best, qualities associated with the Olympic Games. Importantly, it was intended to create a temporal reference for the activity by timing it to the Olympic Games and a social reference by encouraging group watching and sharing.¹⁹⁸ However, that is not enough; the statute requires the simulation create confusion as to the connections between the activity and Olympic Games activities.¹⁹⁹

There are several reasons why confusion is unlikely. Ravelympics is firmly situated in a context that is very distinct from the Olympic Games. On its face, "Ravelympics" is nonsense. The word makes no sense to anyone—even knitters—unless they visit the Raverly.com pages and find the group postings explaining the "Ravelympics Basic Rules."²⁰⁰ As described on those pages, Ravelympics was a virtual event to encourage users to see how many crafts projects they could complete during the time of the Olympic Games, with the goal of expanding users' "knitting/crocheting horizons."²⁰¹ Users were able to compete for "blog badges" to be awarded to those who finished projects in different categories.²⁰² The radically different setting of the events, the virtual versus real-life setting, the crafts versus sports, and the event rules, which

§ 220506(c)(3)(2006).

197. *USOC Notice*, *supra* note 65.

198. *See supra* notes 74–78 and accompanying text.

199. 36 U.S.C. § 220506(c)(3).

200. Ravelympics (and the Ravellenic Games) participants were encouraged to:

Challenge yourself by starting and finishing one or more projects during the 2012 Summer Olympics.

What will be a stretch for you? It could be a new technique, that first sweater or pair of socks, something massive, something delicate, or maybe finishing that monster in the closet. The goal of the Ravellenics is to support you in expanding your knitting/crocheting horizons.

Basic Rules, *supra* note 68.

201. *Id.*

202. *Id.*

emphasize the achievement of a personal best, not besting other knitters, demonstrates that there was no intent to deceive users about the nature of the event, and tends to alleviate and not contribute to confusion or mistake about any actual connection between the event and the Olympic Games.

Nor does the overall context support the conclusion that Ravelympics suggests a false connection to the Olympic Games. While a false connection may exist in non-sporting contexts, here there was no intent to suggest any connection other than timing.²⁰³ The craft projects were understood as an activity separate from, and unconnected to, the actual athletic events of the London Games, except as setting a time limit and a social context for the activity. Every reference to the Olympics was to official Olympic Games activities—the craft competition was synchronized to start and end with the opening and closing ceremonies of the Olympic Games, group members planned knitting parties as opportunities to watch Olympic Games events, and posted links to streaming coverage of the Olympic Games.²⁰⁴

Evidence of the tenuous nature of any connection to official Olympic activities is provided by the USOC letter itself. In its letter the USOC complained that the craft events were so frivolous as to “denigrate the true nature of the Olympic Games,” disrespect the work of the athletes, and “fail to recognize or appreciate their hard work.”²⁰⁵ In short, the USOC complained that Ravelympics was an offensive parody of the Olympic Games. While one might take issue with the conclusion that an “afghan marathon” denigrates Olympic athletes (as many Ravelry.com users did),²⁰⁶ the very affront manifested in the USOC letter makes it extremely unlikely that anyone will come to the false conclusion that Ravelympics (a craft competition) is associated with the Olympic movement (the “pinnacle” of sporting events).

2. Assessing the Ravelympics Nexus with Trading

If the simulation is judged to be confusing or falsely suggests a connection with the Olympic Games, “Ravelympics”

203. *See id.*

204. *See supra* notes 66–78 and accompanying text.

205. *USOC Notice*, *supra* note 65.

206. *See, e.g.,* Pearl-McPhee, *supra* note 98.

must then be determined to be unauthorized use “for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition.”²⁰⁷ The USOC faces significant obstacles in this analytical step as well.

This analysis arguably requires separate consideration of the use of “Ravelympics” by the user group and the host site.²⁰⁸ As designed, the Ravelympics event did not promote trade or induce the sale of goods or services, nor did it tend to generate any kind of income for its organizers. Participation did not depend upon paying an entrance fee or buying specific patterns or supplies.²⁰⁹ In this regard, Ravelympics was similar to the protest of the proposed use of Olympic facilities as a prison, at issue in *Stop the Olympic Prison*, which referenced the Olympics but did not offer items for sale or trade,²¹⁰ and dissimilar to Camp Olympik, a simulation designed to generate income in the form of camp fees.²¹¹ Because the Ravelympics event did not have a commercial purpose, its use by the event organizers should be protected from ASA prohibitions relating to use of simulations “for the purpose of trade, [or] to induce the sale of any goods or services”²¹²

In contrast, the site operators’ use of Ravelympics seems much more closely linked to a trading purpose. In 2008 and 2010, Ravelry.com sold enamel pins first marketed as the “Ravelympics Badge of Glory,” and a similar pin (later renamed the “2012 Ravellenic Games Badge of Glory”) was offered for sale in July and August 2012.²¹³ The sales seem to be classic commercial activity, notwithstanding the pledge to donate sale profits to the Special Olympics.²¹⁴ In addition, the site had an

207. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220506(c) (2006); *see also supra* Part III.A.

208. Separate analysis would be consistent with the way social networks are treated for other purposes. *See, e.g.*, The Communications Decency Act, 47 U.S.C. § 230 (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

209. *Basic Rules*, *supra* note 68.

210. *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112, 1121 (S.D.N.Y. 1980).

211. Memorandum, *supra* note 10, at 3.

212. 36 U.S.C. § 220506(c).

213. *See supra* notes 83–87 and accompanying text.

214. *Id.*

interest in the increased revenues that no doubt flowed from the increased use associated with the event.

Before turning to an assessment of the sufficiency of the nexus between Ravelry.com's use of "Ravelympics" and trade, consideration should be given to any separate challenges to the status of "Ravelympics" as a confusing simulation that the website might assert in its defense. A claim that "2012 Ravelympics Badge of Glory" constitutes improper use of a simulation "tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with [the USOC]"²¹⁵ arguably presents even greater challenges for the USOC than those associated with making the same claim with regard to the Ravelympics event itself. As compared to the group event, it is even less likely that the sale of the Ravelympics Badge of Glory, a pin featuring a dog, no Olympic words or marks, and associated with a crafting website, would be confused with or falsely viewed as connected with official Olympic activity. And once again, anyone interested in owning a 2012 Ravelympics Badge of Glory will be drawn to it because they understand, and appreciate, Ravelympics as a group knitting event, which also lessens the tendency of confusion or false connection. However, if judged to be the inappropriate use of a false or confusing simulation, then the use of the simulation to sell the pin represents use for the purpose of trade prohibited by the ASA. It is worth noting that under a separate analysis, the infringing behavior could be cured by Ravelry.com terminating its sale of the pin or changing the pin's name to something that did not include the word "Ravelympics," a cure which would not, and should not, address the underlying conduct by the Ravelympics group (appropriately so, if the behavior by the group is otherwise unobjectionable).

One could also imagine treating the event and the sale of the pin as one event, since the event organizers were likely consulted about the sale of the pin or had prior knowledge of the website's plan to market it. But, even if the sale of the pin were viewed as part and parcel of the group activity, the pin sales may be so incidental to the craft competition that is the primary focus of the Ravelympics, that it is insufficient to render the primary activity commercial. For example, the *Stop the Olympic Prison* court held that the sale of a few posters did

215. 36 U.S.C. § 220506(c)(3).

not overwhelm the non-commercial purpose of the protest to render the use of the Olympic words and marks improper.²¹⁶ In this case as well, the sale of the pin is incidental: it was not directly associated with the competition, had a charitable purpose, and the number of pins produced were significantly smaller than the number of persons participating in the Ravelympics. Important evidence of the incidental nature of the sale of the pin is the Committee's election to focus its complaints and demands on the details of the Ravelympics event and on the purported frivolous and denigrating comparison of Ravelympics to the Olympic events, only mentioning the pin in an offhand fashion.²¹⁷

Ultimately, it is hard to conclude the necessary prong of use for trade is met by the use of a simulation to promote the Ravelympics group event. The sale of the pin presents the strongest argument for improper use of a simulation; however the better course would be to carefully consider that activity distinct from the user-group activity, and therefore having no impact on the competition. Whether analyzed as a separate behavior or not, any infringement linked to the sale of the pin would be easily cured by stopping the sale of the pin, or removing "Ravelympics" from its title.

3. Assessing Ravelympics as an Exhibition, Performance, or Competition

If Ravelympics does not have a sufficient trading nexus, can the USOC demonstrate another basis for demanding the end to Ravelympics in addition to the removal of patterns and postings violating the commercial provisions of the ASA? Here, there is a slim opportunity, again assuming that Ravelympics has been first determined to be an unauthorized simulation of "Olympic" that falsely suggests a connection to the Olympic Games or causes confusion. While the primary focus is commercial activity, the ASA also prohibits the unauthorized use of Olympic marks, words and improper simulations "to promote any theatrical exhibition, athletic performance, or competition."²¹⁸ Ravelympics is described as a competition, and

216. *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112, 1121 (S.D.N.Y. 1980).

217. In its cease-and-desist letter, the USOC made two specific requests: to change the name of the event, and to remove the Olympic Symbols from patterns and projects. *USOC Notice*, *supra* note 65.

218. 36 U.S.C. § 220506(c).

although the focus is individual achievement, it is organized around teams and has other accoutrements of traditional competitive events.²¹⁹ As such, the USOC may argue that Ravelympics is unauthorized “use . . . to promote any . . . competition” prohibited by the ASA; that interpretation would seem to be consistent with the plain wording of the statute.²²⁰ Interestingly, in *dicta*, courts, including the Supreme Court, have ignored the non-distributive wording of the statute, instead describing the prohibition as reaching to prohibit unauthorized use to promote theatrical events, athletic performances, or athletic competitions rather than theatrical events, athletic performances, or competitions (of any type).²²¹ Accordingly, the USOC might have to convince a court both that “Ravelympics” is confusing or suggests a false connection to the Olympic Games and that the Ravelympics event is the *type* of competition intended to be reached by the ASA. Moreover, even under this analysis, the Ravelympic organizers could sidestep the ASA prohibitions entirely by eliminating all competitive aspects from Ravelympics and instead promote Ravelympics solely as a way to encourage and recognize individual achievement (e.g., everyone who completes a project gets a “blog badge”).

4. First Amendment Considerations of the Objections to Ravelympics

The inherent weaknesses of the USOC claims are underscored by the fact that the group event organizers could easily avoid the competition prohibition of the ASA by simply tweaking the event rules modestly,²²² just as the hosts of Ravelry.com could easily avoid the commercial prohibitions by changing the name of the pin.²²³ In both cases, assuming a

219. *Basic Rules*, *supra* note 68.

220. 36 U.S.C. § 220506(c).

221. *See* S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 535 (1987) (“Section 110 also allows the USOC to prohibit the use of ‘Olympic’ for promotion of theatrical and *athletic events*.” (emphasis added)); U.S. Olympic Comm. v. Am. Media, Inc., 156 F. Supp. 2d 1200, 1206 (D. Colo. 2001).

222. *See supra* note 221 and accompanying text (explaining that eliminating the competitive aspect could be as simple as recognizing all individual achievement with blog badges instead of limiting recognition to the top achievers).

223. *See* discussion *supra* Part III.D.2 (noting that the sale of the pin is the

court agreed that the simulation was likely to cause confusion or falsely suggest a connection to the Olympic Games, the use of “Ravelympics” was simply not integral to the course of the event or driving the interests of those purchasing the pin. Viewed from that perspective, the vehemence of the USOC letter can best be seen as intending to serve a function well beyond protecting the rights of Olympic marks or words and protecting the public from possible confusion. Rather, the USOC sought to protect the purity of the Olympic brand from a use it viewed as “disrespectful” of the Olympic movement.²²⁴ However, the power to protect against disrespect is not an authority granted to the Committee by the ASA.²²⁵ If the Committee vigorously assumed such a role, not only would it constitute an overreach of its statutory authority, it would arguably amount to an effort to control non-commercial elements of speech, well beyond the interest of protecting goodwill. In rebuffing a First Amendment challenge to the USOC in *San Francisco Arts & Athletics*, the Supreme Court majority relied heavily on the fact that commercial speech is afforded fewer protections than political speech.²²⁶ This suggests that a mixed message, or a predominantly political message, should receive stronger protections.²²⁷ An effort to limit disrespect of the Olympic Games could be interpreted as sufficiently linked to expression that is political in nature to

closest thing to a violation of ASA, but the website owners could just change the name of the pin to avoid violating the ASA).

224. See *USOC Notice*, *supra* note 65 (“The USOC is responsible for preserving the Olympic Movement and its ideals within the United States. Part of that responsibility is to ensure that Olympic trademarks, imagery and terminology are protected and given the appropriate respect. . . . In a sense, it is disrespectful to our country’s fine athletes and fails to recognize or appreciate their hard work.”).

225. 36 U.S.C. §§ 220505–06 (granting powers of enforcement and property rights to “name, seals, emblems, and badges”); see also *supra* Part III.A (discussing powers granted by the ASA).

226. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 535 (1987) (quoting *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986)) (stating that the USOC does not need to show that the unauthorized use is likely to confuse the public to show a violation of the ASA).

227. See *id.* at 536 n.14 (explaining that the only types of speech limited by the ASA are commercial or promotional; political speech is not limited by the ASA and is protected by the First Amendment). But see Barrett, *supra* note 152, at 987 (“However, mixed messages, which simultaneously propose a commercial transaction and address social, political, or other issues of public interest, may be deemed ‘commercial speech,’ and thus subjected to lesser First Amendment protection.”).

trigger heightened consideration of First Amendment rights under the Court's analysis.

Our strongest First Amendment protections are reserved for political speech.²²⁸ For example, in the notorious case *Texas v. Johnson*,²²⁹ the Supreme Court held that the state may not punish someone for being critical about the flag, "including those opinions which are defiant or contemptuous."²³⁰ It then invalidated a statute prohibiting the burning of the U.S. flag.²³¹ Assuming, for the sake of argument, that an Olympic-themed knitting competition, by intent or accident, denigrates the U.S. Olympic effort and its ideals (as claimed by the USOC in its letter), then that commentary seems to fall out of the commercial realm and into the realm of opinion. Consequently, it should be afforded greater First Amendment protection by the courts.²³² Indeed, given the quasi-public nature of the Olympic effort, as understood by the courts and suggested by the USOC in its letter, *any* demonstration of a less than respectful attitude about the Olympics is arguably speech of an inherently political character. There is no indication that the Court would extend to the Olympic brand greater protections than those offered the U.S. flag. Indeed, there is no indication that Congress ever intended to confer upon the USOC powers to protect the brand from disrespect, well beyond the commercial and promotional protections conferred by the ASA, with the potential effect of silencing public opinion. There are other hurdles, to be sure, including whether the state action requirement would continue to shield the USOC from First Amendment challenges even as it seeks to limit speech that has political elements. However, this line of reasoning might well persuade a court to find against the USOC to the extent its

228. *Texas v. Johnson*, 491 U.S. 397, 401 (1989) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)) ("[T]he right to differ is the centerpiece of our First Amendment freedoms . . ." (quoting *Johnson v. Texas*, 755 S.W.2d 92, 97 (Tex. Crim. App. 1988) (en banc))).

229. *Id.*

230. *Id.* at 414 (quoting *Street v. New York*, 394 U.S. 576, 593 (1969)).

231. *Id.* at 419 ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.").

232. *Cf. S.F. Arts & Athletics*, 483 U.S. at 536 (stating that it is unclear if purely expressive uses are restricted by the ASA). The court notes that any restrictions on expressive speech by the ASA are only "incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities." *Id.*

claims against the Ravelympics event are primarily based on objections to the content of the message as demeaning the Olympic movement.

The foregoing analysis of whether the Ravelympics event or the sale of the Ravelympics pin represented actionable unauthorized use under the ASA results in two different conclusions. Looking at the statutory language and case law demonstrates that the argument to discontinue the event under its original name is much weaker than the argument for prohibiting the website from selling the Ravelympics pin.

IV. THE CASE FOR A DIFFERENT LEGAL FRAMEWORK

Both the claims related to postings and the claims related to Ravelympics contained in the USOC cease-and-desist letter were troubling overstatements of its legal rights and authorities. Although the USOC correctly objected to the sales of those patterns using the word “Olympic” in marketing, as well as those incorporating protected marks and words in pattern designs, the personal postings of Olympic themed projects and the free distribution of Olympic themed patterns are not prohibited by the ASA.²³³ By every legal measure, the USOC objections to the Ravelympic group event, and even the sale of the Ravelympic pin, are deeply problematic at best. The significant gap between the merit of the USOC claims and the assertion of USOC authority in this particular case of alleged infringement offers opportunities to think about the best ways to protect the Olympic brand and better match those protections with contemporary needs.

One important contemporary factor is the internet. The vibrancy of social networking sites, as well as other tools that allow everyday people to disseminate and market goods and services, create special problems for the enforcement of all trademarks.²³⁴ The advent of internet interfaces of all sorts allows many more people to have the ability to access global markets. For example, craft items can be found for sale on numerous dedicated sites, including Ravelry.com, ebay.com,

233. See *supra* Part III.C.

234. See generally ANNIE L. ALBERTSON, TRADEMARKS IN THE SOCIAL MEDIA AGE (2011), available at http://www.buchalter.com/bt/images/stories/Attorney_Articles/trademarks_in_the_social_media_age_albertson.pdf (reviewing the benefits and drawbacks of the impact of social media on trademark enforcement).

etsy.com, and ezcraftshow.com, to name a few.²³⁵ But there is no concomitant increase in the basic skill set of the thousands of new businesspersons who step into internet markets each day, with the potential to reach markets all around the world.²³⁶ If I set out to sell “Marcella’s pattern for an Olympic Scarf” on Ravelry.com, I can reach three million users living all around the world.²³⁷ But what is the likelihood that I have an appreciation of the many issues a business person in a bricks-and-mortar store is expected to appreciate, let alone specialized trademark issues?²³⁸ The USOC understandably appreciates the exponential challenges of controlling infringement in the environment of the internet and worries that infringement that is ignored has an impact that is global, not merely local.²³⁹

There are many different ways to approach this problem. The burden could be placed on the host sites by asking them to provide more education to users who want to use commercial functions. While this might reach a large number of new businesspersons, this is likely to be as ineffective as the current “click-through” of warnings computer users face on a daily basis.²⁴⁰ We could require host sites to actively police content. This option would place a significant burden on the hosts, who

235. EBAY, <http://www.ebay.com/> (last visited Mar. 2, 2013); ETSY, <http://www.etsy.com/> (last visited Mar. 2, 2013); EZ CRAFT SHOW, <http://www.ezcraftshow.com/> (last visited Mar. 2, 2013); RAVELRY, *supra* note 59.

236. See, e.g., *How to Sell Stuff Online*, EHOW TECH, http://www.ehow.com/how_136987_sell-stuff-online.html (last visited Mar. 3, 2013) (recommending that before selling online, people should “learn the ins and outs of online selling through community education classes or eBay University”).

237. RAVELRY, *supra* note 59.

238. Examples of the issues a business person must address include the collection of appropriate taxes and treating the revenue as income.

239. See Maya Yamazaki, *Trademark Issues to Consider When Covering the Upcoming 2012 Olympic Games*, MEDIA L. MONITOR (June 18, 2012), <http://www.medialawmonitor.com/2012/06/trademark-issues-to-consider-when-covering-the-upcoming-2012-olympic-games/> (“[T]he USOC has developed a highly organized and aggressive program to license and enforce these rights.”). There are, of course, some benefits as well, such as the ability to sit at a desk and search for and find infringing material and examine it virtually. See ALBERTSON, *supra* note 234.

240. Cf. Charles Carreon, *Click Wrap Agreements are Generally Enforceable*, CHARLES CARREON’S PRIMER ONLINE MEDIA L., http://onlinemedialaw.com/Contracts_and_Click_Wraps/Click_Wrap_Agreements_Are_Generally_Enforceable (last visited Mar. 3, 2013) (discussing that in order for an online agreement to be enforceable, users must have an opportunity to read the terms, even if they do not actually read them).

may not have the resources to scan content regularly, or the legal skills to evaluate *ex ante* if conduct is infringing. Facebook may have a large legal staff, but Ravelry.com is run by only a handful of people.²⁴¹ Beyond staffing issues, this case presents the added challenge of appreciating how the ASA has been interpreted as granting additional protections and enforcement powers beyond what is typical for trademarks.²⁴² Even seasoned lawyers might find it hard to determine if posted content exceeds the peculiar rights protected by the ASA.

Thus far, through legislation such as the Digital Millennium Copyright Act,²⁴³ Congress has not required affirmative action by site operators, but rather requires appropriate action to remedy legitimate claims brought to their attention about user content (e.g., copyright claims). Putting the burden of either trademark or copyright protection on site owners would present important policy issues that argue against that solution. Most commercial sites will react to a complaint by seeking to remove the offending content. However, the commercial interest of site owners may be at odds with both the interest of the targets of the cease-and-desist letter and the public at large. The organizers of Ravelympics (the social network users) have an expressive interest at risk while the operators of Ravelry.com are working to protect business interests. The Ravelympics group members were highly protective of their expressive content and resistant to the demand to change the name; indeed the outcry demonstrated how deeply offensive many groups members found the USOC cease-and-desist letter and demands.²⁴⁴ At the same time, very different business interests made the site organizers amazingly compliant; Ravelry.com was immediately willing to police its users with little objection to the broad (and arguably overreaching) demand, notwithstanding the offense

241. Compare Amy Miller, *Inside Facebook's 30-lawyer Legal Department*, DAILY BUS. REV. (June 14, 2011), http://www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202497025499&Inside_Facebooks_30lawyer_legal_department&slreturn=20130202164004 (stating that 30 lawyers is a relatively large legal department for a "pre-public company"), with *2012: a Ravelry Year in Review*, RAVELRY (Jan. 11, 2013), <http://blog.ravelry.com/> (stating that a fifth staff member was added in 2012).

242. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 523 (1987) (noting the enhanced protections).

243. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C. (2006)).

244. See *supra* notes 22–23, 98–101 and accompanying text (summarizing the response that Ravelry.com users had to the USOC cease-and-desist letter).

taken by many group members.²⁴⁵ In the context of internet platforms, the demand and response mechanism of enforcement thus creates the real risk of web hosts stifling arguably legitimate activity and the chilling of what may well be legitimate speech on the part of site users. We should be concerned that overzealousness on the part of risk-averse host sites will work against user interest, and consequently chill speech in a way that detrimentally affects the public interest.

These concerns are only exacerbated because of the uniqueness of the power granted to the USOC by the ASA to reach conduct that is unauthorized and non-confusing.²⁴⁶ The sale of "Marcella's pattern for Your Own NASCAR Scarf" *might* infringe on a NASCAR trademark, assuming NASCAR is able to demonstrate likely confusion, as is required in normal trademark cases. The sale of "Marcella's pattern for an Olympic Scarf" *is* infringing without requiring a demonstration of likely confusion.²⁴⁷ This puts at risk of infringement a lot of uses that have no economic impact on the Committee's commercial interest. The USOC, frankly, should not be concerned about enforcement in these types of situations, yet may feel compelled to pursue it in order to protect its legitimate exclusive commercial interests. The USOC will find it increasingly difficult to enforce against *de minimus* infringement as the internet continues its user-friendly, self-help trajectory. It will be even harder for the USOC to enforce its rights in ways that do not also sweep up non-infringing content, such as the gift of "Marcella's pattern for an Olympic Scarf."

Some might argue that the time has come for Congress to legislatively repeal the special rights conferred on the USOC by excepting it from the traditional trademark context.²⁴⁸ Other issues that a statutory revision might address include answering questions related to "ambush marketing," or how best to protect the Olympic brand on the internet generally, and on social-networking sites specifically, both in commercial and non-commercial contexts.²⁴⁹ Congress might also offer an

245. See *supra* text accompanying notes 88, 102.

246. See *supra* Part III.A–B.

247. *Id.*

248. See, e.g., Colbrook, *supra* note 132, at 66–69 (suggesting that enforcement through the Lanham Act could adequately protect the USOC's interests).

249. For example, can Olympic organizers really ban the posting of any

approach on how to address the use of Olympic marks and words when it contains both commercial and political aspects. However, congressional action on these issues seems unlikely, as does the success of any effort to legislate such thorny issues in a way that leads to more clarity and less confusion.

These questions might also be settled by the courts, which could limit or expand the scope of prior case law based on new circumstances, unanticipated contexts, as well as possibly develop new legal doctrines. But the nature of cease-and-desist letters operates against judicial review. Businesses seeking to protect their marks have an interest in creatively interpreting the law and stating their position with utmost confidence in the cease-and-desist letters they transmit. Businesses (or individuals) receiving letters are intimidated by the demand and may seek the least costly response, which often is to concede to the demands of the business making the demand.²⁵⁰ The legitimacy of the claims is unchallenged, and the courts have had limited opportunity to check potential Committee overreach or opine on interesting new questions.²⁵¹ As the USOC keeps winning, it succumbs to the temptation to assert ever more vehement claims of protected rights.

Some more modest corrections might be pursued and achieved at this time. As a small, but important first step, Congress could amend the ASA to require mediation or arbitration of USOC claims of infringement. Providing a less-costly avenue for dispute resolution could level the playing field, and steer those with concerns about the scope of a particular USOC claim to a more-readily available, cheaper, and more efficient forum to test its appropriateness. On the other side of the equation, an increased possibility of review may instill more caution in the USOC. For example, a USOC spokesman interviewed in response to the Ravelry.com letter acknowledged that personal use of Olympic marks and words were acceptable uses.²⁵² So why did the letter to Ravelry.com attempt to reach non-personal use? The answer might be as simple as “why not try?”, and disincentives to that kind of behavior would benefit the public.

photos on the internet, whether or not for commercial purposes, as a condition of attending the Games? See LONDON ORGANISING COMM. OF THE OLYMPIC GAMES, *supra* note 191.

250. See *supra* notes 6–10 and accompanying text.

251. See *id.*

252. Suddath, *supra* note 23.

However, alternative dispute resolution is not a magic bullet; while generally cheaper and faster than litigation, it too can be costly and time consuming when viewed from the perspective of a small business.²⁵³ Further, it wouldn't address the fact that the ASA applies with equal force to the duplicitous online marketer of "Official Olympik Tickets" as it does to the woman selling dish towel patterns for \$2.00.²⁵⁴ Even if the Committee agrees that *de minimus* "dish towel infringements"²⁵⁵ should be excepted as harmless, the way the ASA and trademark law is written incentivizes the USOC to protect against infringement by all, without exception. Congress could also helpfully amend the statute to except *de minimus* infringements below a certain dollar value from requiring USOC authorization for use, unless it is shown that there is likely or actual confusion of sponsorship. Such an amendment would not interfere with the USOC mission to raise funds in support of Olympic effort; if there is no confusion, there should be no loss in revenue. Anyone who wants an official pin of the 2012 Olympic Games is not likely to buy the "2012 Ravelympic Badge of Glory" (and vice versa). A solution of this sort would build upon the helpful model of the Creative Commons, which supports minimal, non-commercial sharing of copyrighted materials to stimulate "digital creativity, sharing and innovation."²⁵⁶ Allowing some creative derivative use of Olympic words and symbols—without actual or likely confusion of official sponsorship—would arguably support the work of the USOC by allowing it to focus its efforts on stopping revenue-diverting or misleading commercial activity. Moreover, the creative participation of thousands (and potentially millions) of crafters around the Olympics could be harnessed to generate goodwill instead of bad feelings. In short, under that legislative model, the USOC would be free to consider a pattern for

253. Robert M. Tessier, *Making Effective Use of Alternative Dispute Resolution for Small Businesses*, TESSIER MEDIATION, <http://www.tessiermediation.com/effectiveuseadr.html> (arguing that while alternative dispute resolution might be preferred over litigation, it is not perfect, as it comes with its own costs).

254. See *supra* Part III.A–C.

255. I include here Olympic Gyros in Pennsylvania, and casual promotions by schools and civic groups of local "olympics" of all sorts, including the marketing of associated gear.

256. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Feb. 22, 2013).

dishtowels featuring Olympic rings as an opportunity to generate excitement about the Olympics, rather than an infringement demanding a response.

V. LESSONS FOR LAWYERING (OR, WHAT WERE THEY THINKING, AND WHY DIDN'T SOMEONE STOP THEM!?)

In the wake of the remarkable publicity that was inspired by the posting of the cease-and-desist letter, the USOC posted two statements. The first statement asserted that the letter was “a standard-form cease-and-desist letter that explained why we need to protect our trademarks in legal terms,” and that there was no intent to “personal[ly] attack” knitters or “suggest that knitters are not supportive of Team USA.”²⁵⁷ Then, when this statement only further inflamed Ravelry.com users, and fueled additional press coverage of the issue, the USOC issued a second statement:

As a follow-up to our previous statement on this subject, we would again like to apologize to the members of the Ravelry community. While we stand by our obligation to protect the marks and terms associated with the Olympic and Paralympic Movements in the United States, we sincerely regret the use of insensitive terms in relation to the actions of a group that was clearly not intending to denigrate or disrespect the Olympic Movement. We hope you'll accept this apology and continue to support the Olympic Games.²⁵⁸

In a further elaboration and explanation of how the first statement could so completely mischaracterize the cease-and-desist letter, a USOC representative was reported as saying that the letter was “sent from our law department and was written by a summer law clerk The ‘denigration’ statement was made in error.”²⁵⁹ Even while eventually regretting that the letter was “probably a bit too strongly worded,” the USOC continued to maintain its right to vigorously protect its rights in Olympic marks and words.²⁶⁰ While the scope of its rights has been addressed earlier in this article, there are important lessons about lawyering that are also provided by this example.

A. REMEMBER THE LIMITATIONS OF LAW STUDENTS

“Wow,” said a colleague of mine, “they really threw that law student under the bus!” The face-saving suggestion by the

257. *Statement from USOC Spokesperson Patrick Sandusky, supra* note 103.

258. *Id.*

259. Suddath, *supra* note 23.

260. *Id.*

USOC that the Ravelry.com letter was over the top because of an overzealous “summer law clerk”²⁶¹ must be understood as insufficient. No law student should be sending letters on behalf of a client without the supervision of a responsible attorney. If there was no supervision, then shame on the supervising attorney and the management of the general counsel office for poorly representing the interests of the USOC. If there was supervision, then double shame, first for diverting attention from the malfeasance of staff by scapegoating the student, and second for poor lawyering. However it came to be sent, the letter poorly represented the interests of the USOC.

B. THE CEASE-AND-DESIST LETTER WAS WRONG ON THE LAW

As demonstrated earlier in this article, various statements about the distribution of patterns and posting of projects were oblivious to the requirement of trading purpose of the ASA (or even the commercial use requirement of the Lanham Act).²⁶² In a similar fashion, the bald assertion that Ravelympics is a simulation, and “[t]hus the use of RAVELympics is prohibited by the Act,”²⁶³ without regard for the important requirement of commercial activity, was a breathtaking overstatement of the authority granted to the USOC under the ASA.²⁶⁴ While cease-and-desist letters can be expected to assert trademark claims aggressively, a misleading and illegitimate statement of the law can lead to detrimental legal consequences should the case go to court, and arguably runs afoul of the professional responsibilities of the lawyers involved.

C. THE CEASE-AND-DESIST LETTER WAS POORLY WRITTEN

The letter clearly identified the subject of concern and the proposed course of action, the organization flowed smoothly, and the sentences were clear and direct.²⁶⁵ Yet this letter is a demonstration of much that critics claim is wrong with legal education. The writer lost track of the people in the equation, and seemed unaware of what strategies would best achieve the goals of the client: ending the use of the term “Ravelympics”

261. *Id.*

262. *See supra* Part III.C.

263. *USOC Notice, supra* note 65.

264. *See supra* Part III.D.

265. *See USOC Notice, supra* note 65.

and stopping the sale of material using Olympic words and marks.

The writer was apparently offended by the suggestion that knitting skills and achievements are comparable to the skills and achievements of Olympic athletes. However, should that line of argument *ever* become relevant to the straightforward argument of infringement, it was certainly not necessary in that letter, in that stage of the dispute. Indeed, including that statement worked counter to the needs of the client by inflaming the sensibilities of a very large, vocal, and invested group of people.²⁶⁶ It offered them the opportunity to argue against what they understood as an irrelevant fallacy (that Ravelympics denigrated the efforts of Olympic athletes), diverting their attention away from and potentially delaying their response to what should have been the focus of the letter, the strength (or weakness) of the legal assertion (that Ravelympics infringes on the protected word “Olympic”). Most of the postings—including statements by the Ravelympic organizers—suggested that the community would have acceded to the demand to change the name of the event quite quickly, but for the unnecessary and insulting paragraph.²⁶⁷

As a new instructor, I taught for a number of years in the legal research and writing component, which was incorporated into our first-year courses at the time. I struggled to convey to students the lesson that sticking to the argument was professional, effective, and in the best interest of the client. The Ravelympics cease-and-desist letter is an unfortunately crisp example of how straying from that principle can have unintended consequences.²⁶⁸ There are better approaches that the USOC could model. A cease-and-desist letter by whiskey distributor Jack Daniel’s also went viral the summer of 2012, but was cited as a demonstration of effective yet polite advocacy.²⁶⁹ The letter requested the author of a book stop

266. See *supra* note 22 and accompanying text.

267. The organizers embraced the task of renaming, inviting members to suggest new names and hosting a renaming ‘ceremony’ on its discussion board. Kimberli, *supra* note 102 (“Later tonight we’ll have a special impromptu ceremony to say goodbye to our much-loved *Thou Name That Shalt Not Be Uttered From Now On* and welcome our new name in true awesome Ravelry fashion—Watch for it!”).

268. It is also troubling that the supervisor of the law student allowed this letter to go out, suggesting that the gaps in skills training cannot be filled solely by placement with legal professionals.

269. See Debra Cassens Weiss, *Jack Daniel’s Cease-and-Desist Letter Goes*

using a simulation of elements of the Jack Daniel's label in his book's cover design.²⁷⁰ In its letter the attorney for the company thanked the author for his "flatter[ing] . . . affection for the brand," but noted that diligence required vigilant protection of the brand and its marks.²⁷¹ It also offered to help defray the costs of designing a new cover.²⁷² The letter was immensely effective in generating good will for the company, and led to a design of a new cover.²⁷³ Although images of the old cover are still available on the web—most notably on the book's Amazon.com page—it is linked to the letter and the positive good will the letter generated.²⁷⁴

The USOC's less conciliatory approach is a striking counter example to the Jack Daniel's letter. It is also an example of a lesson that was less important when I last taught legal writing: that you should write every communication as if it is going to be posted on the web, because it will be (especially if it is a letter to an online community)! Once amplified by the web, your message or intent will be distorted, so beware.

D. DON'T FORGET TO THINK ABOUT OTHER OPTIONS: CREATIVE BUSINESS SOLUTIONS

Another striking feature of the USOC letter was its lack of ingenuity. Presented with the creative demonstration of interest on the part of a huge, skilled crafts community, the

Viral for Being Exceedingly Polite, A.B.A. J. (July 26, 2012, 8:38 AM), http://www.abajournal.com/news/article/jack_daniels_cease-and-desist_letter_goes_viral_for_being_exceedingly_poli; see also *Broken Piano for President: #1 Satire, #6 Bestseller at Amazon (Updated)*, LAZY FASCIST PRESS (July 24, 2012), <http://lazyfascistpress.com/2012/07/24/broken-piano-for-president-1-satire-33-bestseller-at-amazon>.

270. Weiss, *supra* note 269.

271. *Id.*

272. *Id.*

273. *Jack Daniel's Rejection Letter Guy Gets New Book Cover Design*, MASHABLE, <http://mashable.com/2012/10/02/jack-daniels-rejection-letter-guy-gets-new-book-cover-design> (last visited Feb. 21, 2013) (noting that the widespread distribution of the letter "was probably better advertising than a year's worth of back-page *Rolling Stone* ads").

274. The Amazon.com product description includes a reference to the "World's Nicest Cease and Desist Letter." See *Broken Piano for President [Paperback]*, AMAZON.COM, http://www.amazon.com/Broken-Piano-President-Patrick-Wensink/dp/1621050203/ref=sr_1_1?ie=UTF8&qid=1343117286&sr=8-1&keywords=broken+piano+for+president&tag=vglmk-c498-20 (last visited Feb. 21, 2013).

USOC effort was focused solely on shutting that creativity down. It didn't object to the patterns—in its first explanatory statement the USOC praised knitters and vaguely encouraged Ravelry.com members to send knitted items to the USOC to support the Olympic spirit.²⁷⁵ The USOC just didn't want the patterns posted. Why not channel that energy by creating an appropriate licensing mechanism? Or offer a bulk license at a minimal charge to Ravelry.com, which could cover users seeking to market patterns that incorporate or otherwise use Olympic marks or words?

This suggestion might seem unrealistic in terms of the costs associated, both on the part of the USOC and Ravelry.com, for very little financial gain. However, the USOC could use such a model, once created, in other contexts (on other social networking sites, hosted business webpages, and photography sharing sites, for example). The better lawyer might advise the USOC to think about ways to turn a potentially adversarial conflict into a partnership that could yield positive long-term results, and create a positive business model for trademark protection. Imagine what that could do in generating good will towards the USOC!

VI. CONCLUSION

The internet is a creative platform that presents interesting challenges to those seeking to protect the use of words and marks associated with their business operations. Unique challenges are arguably presented by the USOC's efforts to protect the statutory rights in words and marks granted by the ASA, suggesting the need for new thinking about the appropriate legal framework. The greater question of the effective strategies for vindicating trademark rights in the age of the internet will only be solved through creative lawyering and business strategies.

²⁷⁵. *Statement from USOC Spokesperson Patrick Sandusky, supra* note 103.

APPENDIX I



276



277

276. 2010 Badge of Glory, *supra* note 83.

277. 2012 Ravellenic Games Badge of Glory, *supra* note 83.